I will begin with some rather specific comments on Cass Sunstein’s paper and end up addressing some broader themes raised by Lynn Stout and Doug North in their papers.

Cass’s paper reports a study conducted with his collaborators, Daniel Kahneman and David Schkade, exploring the effects of jury deliberation on punitive damages awards. After hearing facts about hypothetical personal injury cases, people were asked to judge the defendants’ actions by choosing a number on a “punishment scale” (ranging from 0 to 8) and by assigning a dollar award for punitive damages. They then formed 6 person juries and were asked to reach a “punishment verdict” and a “dollar verdict” as a group.

The study produced several findings:

(1) Moral judgments in personal injury cases tend to be predictable and widely shared; that is, “punishment verdicts” show a high degree of agreement across groups.

(2) Unlike the punishment verdicts, jurors’ dollar awards are highly unpredictable; their monetary judgments are far from shared.

(3) Deliberation tends to push juries to extremes. In cases initially judged to be relatively mild, deliberation resulted in lower “punishment verdicts” compared with jurors predeliberation judgments. In cases initially judged to be severe, deliberation resulted in higher “punishment verdicts” compared with jurors’ predeliberation judgments.

(4) Deliberation tended to push juries toward higher dollar awards for punitive damages across all cases. This effect was observed even for cases in which the punishment verdicts decreased after deliberation. They refer to this finding as a “severity shift” in dollar verdicts.

Several hypotheses were offered to explain these findings: (1) moral norms regarding tortious behavior are widely shared in our society; (2) the variability in punitive dollar awards results from the cognitive difficulty of “scaling without a modulus”; that is, trying to assign a value without a reference point; (3) group polarization occurs because of the greater availability within the group of arguments pointing in the direction of the dominant tendency and because of reputational concerns; (4) dollar verdicts generally increased across all cases because of a “rhetorical asymmetry”, giving those favoring a higher dollar award a “rhetorical advantage” over those arguing for a lower award.

Of these findings, I found the last one—the finding of a “severity shift”—to be the most interesting because it is so unexpected. The third finding—that deliberation produced more extreme
judgments—is hardly surprising, given numerous studies documenting the phenomenon of “group polarization” in other contexts.

What is surprising, is that dollar verdicts increased after deliberation in all cases, even those in which punishment verdicts decreased. Given the phenomenon of group polarization, one would expect dollar verdicts to move in the same direction as punishment verdicts after deliberation. In cases rated low on both the punishment and dollar scales, one would expect to see lower punishment verdicts and lower dollar verdicts. Instead, we hear that deliberation tended to decrease punishment verdicts, but increase dollar verdicts in these cases.

In order to explain this unexpected “severity shift”, Cass hypothesizes the existence of a “rhetorical asymmetry”. That is, those who favor a higher dollar award have a “rhetorical advantage” over those arguing for a lower amount.

But what exactly constitutes a “rhetorical advantage”? Does it mean that no plausible arguments exist for lower punitive damages awards? Or that those arguments are difficult for individual jurors to raise because they are afraid of looking sympathetic to big corporations? Or insufficiently compassionate toward tort victims? Or does it mean that certain arguments are inherently more persuasive than their counter arguments? Cass’s account is a bit unclear on this point. He suggests only that “in light of existing norms” those arguing for more dollars have an “automatic upper-hand” because those arguments are “simply more intuitive, in the abstract.”

I was sufficiently intrigued by these findings and this explanation to conduct a small experiment of my own. Using one of the same fact patterns, I asked my first year civil procedure students to assign a punishment rating and a punitive dollar award individually. Next, they formed 6 person juries to deliberate on a punitive dollar award. Once deliberations were completed, each student wrote a brief narrative describing the deliberation process.

A string of caveats are appropriate here: my mini-experiment involved a very small sample—36 students; 6 juries. My subjects—law students—are likely quite unrepresentative of the typical juror. The narratives are self-reported accounts, subject to the usual limitations of memory, self-serving biases, etc. So I’m not making any strong claims here, merely raising some questions based on my anecdotal findings.
First, the numerical results. These were quite consistent with the Cass’s findings. The moral judgments reported in my sample tended to converge, indeed at nearly the same numerical point as in their study of over 3000 mock jurors. Individual dollar verdicts, on the other hand, were widely dispersed. Of the 6 deliberating juries, only 4 reached a unanimous verdict. For each of those, the punitive dollar verdicts were higher than the dollar verdict of the median juror predeliberation, in some cases significantly higher.

So far, so good. But what about evidence of a “rhetorical asymmetry”? Because the fact pattern used was on the more severe end of the scale, one would expect any “rhetorical advantage” to be particularly apparent. Reading through the narratives, however, revealed far more arguments for a lower punitive dollar award than a higher dollar award. These included:

- the award should not be so large it ruins the company
- the company will be sued again and the combined burden of suits will deter
- too high an award will have a negative impact on prices/consumers pay
- the plaintiffs are partly responsible for what happened
- too large an award would be an unwarranted windfall to the plaintiffs
- the government was at fault for not enforcing regulations
- too large an award will encourage other plaintiffs to line up

On the other hand, those arguing for more dollars made the same two arguments over and over: a large award was necessary to sufficiently punish the company and deter future bad conduct. Interestingly, a quick review of transcripts of 4 jury deliberations on the same case recorded by Cass and his colleagues produced a virtually identical list of arguments in favor of a lower award, and a similarly short list in favor of a higher award.

So, it seems unlikely that any rhetorical asymmetry can be explained by a complete lack of arguments for lower dollar awards, or by the reluctance of individual jurors to raise those arguments.

What then of the suggestion that the arguments for more dollars are “simply more intuitive”? Perhaps the very focused nature of the arguments for more dollars created a rhetorical advantage over more diffuse arguments in the other direction.
But, there is another possible explanation. Perhaps the mock jurors were “primed” by the structure of the experiment to see the “more dollars” arguments as more persuasive or authoritative. Consider that the instructions state: “Punitive damages are intended to achieve two purposes: (1) to punish the defendant for unusual misconduct, and (2) to deter the defendant and others from committing similar actions in the future.” In addition, by the time they rendered their dollar verdicts, jurors had also been instructed at least 3, possibly 4 times, to decide: “What amount of punitive damages (if any) should the defendant be required to pay as punishment and to deter the defendant and others from similar actions in the future?” In contrast, none of the arguments for fewer dollars that the jurors made during deliberation were presented anywhere in the fact pattern or instructions.

Of course, only further experimentation can sort out whether a true rhetorical advantage accounts for the observed severity shift, or whether the rhetorical balance between opposing arguments is manipulable through juror instructions.

But a more general point can be made here. An argument that is “rhetorically advantaged” in one setting, or with one group of people, or in one culture, may not be so in a different context. As Cass has suggested, rhetorical advantage likely reflects existing norms. And because norms vary in their content across cultures and across time, rhetorical advantage or disadvantage is likely to be highly contingent and context-dependent.

Notice, then, that the claim that rhetorical advantage accounts for the severity shift in dollars is a different sort of explanation altogether than that offered for the broad variance in individual’s dollar awards—that is, that people have difficulty scaling without a modulus. The latter explanation relies on the findings of behavioral science. It suggests that our cognitive limitations make certain kinds of judgments—such as assigning numerical values on an unbounded scale without a reference point—extremely difficult. The “rhetorical advantage” theory, by contrast, looks to the existence of norms—socially contingent norms—rather than any inherent cognitive limits.

These two explanations are examples of a larger trend. In the past several years it has become commonplace to question the rationality assumption embedded in classical law and economics scholarship. Although the challenges have come from 2 distinct directions—behavioral science and norm theory—the tendency has been to link them together as aspects of the same phenomenon. While Cass’s paper advances both sorts of explanations without suggesting any differences in their underlying
nature, Lynn Stout’s paper expressly tries to link the findings of behavioral science with norm theory. Both, I believe, are motivated by the hope that the rational choice model can be enriched, rather than dismantled, by insights from behavioral science and norm theory.

I want to suggest here that the challenges posed by behavioral science and norm theory to the law and economics paradigm are different in kind. Experimental work in psychology has shown that people depart from a rational decision-making model in certain predictable ways. Framing effects, endowment effects, availability and representativeness biases and hindsight bias all result in behaviors or judgments that appear anomalous from a rational choice perspective. The application of these experimental findings to real world settings is controversial. But it is at least conceivable that, through further study, we will be able to specify the conditions under which certain cognitive biases occur, such that prediction across a wide range of situations may be possible. Even though the frequency and magnitude of their effects in the real world is currently uncertain, at least the direction in which these heuristics and biases operate appears well-established. (For example, it may be possible to control or compensate for hindsight bias, but no one suggests that we systematically underestimate our ex ante predictions of an event after the event has actually occurred.)

My hunch is that the study of norms will prove far more intractable, at least for those who hope it can be incorporated into a formal behavioral model. It is true that the ultimatum games, dictator games and social cooperation games Lynn discusses reveal certain regularities in behavior, at least in the experimental setting. She argues that this evidence of what she calls “other-regarding preferences” helps explain the content and effect of informal norms.

But I believe that there is some distance yet to travel before the experimental evidence can explain much about the operation of norms in the real world. For example, ultimatum games reveal that people regularly reject offers they perceive to be “unfair”, as measured against some “reference transaction”, even at personal cost to themselves. But evidence that people care about fairness does not help us much to know what they will think the relevant “reference transaction” is when faced with real world choices. Beliefs about fairness cannot be deduced from abstract theory. Rather, the relevant reference transaction will depend upon prior experience and common cultural understandings. In other words, the informal norms that shape behavior are more likely to be contingent than universal.

Lynn also suggests that the “other-regarding preferences” revealed through behavioral
experiments will favor the evolution of socially efficient norms—that is, norms that maximize the welfare of the group. Once again, however, understanding norms as historically and socially contingent clouds this rosy picture. Technological and social conditions change. Norms that may have been efficient at one time may cease to be so. If feedback on the effects of norms are imperfect, or if norms, once internalized, tend to persist, there is no assurance that any particular norm will in fact be efficient under current conditions. The argument that norms are likely to be efficient also ignores the question of whose welfare will be maximized. In some Southern white communities in the early 20th century, and in some urban youth gangs today, a norm exists that perceived harms to the group should be avenged outside of the formal legal process. Such a norm may be welfare-maximizing for those groups, but that is hardly reason to applaud them.

Even if we could reliably predict what the content of relevant norms will be, or when they are likely to be efficient, the interaction between norms and law is far from simple. Lynn suggests that the state can promote desirable norms by announcing laws consistent with them. Yet attempts at norm change may backfire. Laws that are contrary to prevailing norms may provoke resistance and ultimately undermine respect for the law. Or, it may turn out that change in the law is more or less irrelevant, where behavior is regulated primarily by informal norms and people are generally ignorant of the law. The point is that we are a long way from predicting with any confidence what effect a change in legal rules will have on informal norms.

If norms are historically and culturally contingent in the way I have suggested, predicting the content of informal norms, their effects on behavior and their interaction with formal legal rules will be extremely difficult. I do not know if these difficulties amount to uncertainty in the strong sense that Doug North used the word when he asked whether we live in a “nonergodic” world. But they do suggest that, at least in the short run, norms cannot easily be incorporated into traditional law and economics models simply by enriching an assumption here or tweaking the analysis there.

I suspect some staunch law and economics scholars would agree with me, and argue that, therefore, norms don’t deserve much attention. I would draw a different conclusion. The difficulty of incorporating norms into traditional law and economics analysis suggests, not the irrelevance of norms, but the limitations of the traditional law and economics paradigm. Where formal law dominates, or informal norms are aligned with the assumptions of rational choice theory, the law and economics paradigm will have its greatest predictive power. Where informal norms dominate, or deviate
significantly from those assumptions, that paradigm is far less likely to provide meaningful answers about what the law does or should be.