that courts are unqualified or unable to reverse legislative determinations of policies conducive to the general welfare. Consistency would therefore require avoidance of judicial review in those cases in which condemnation may be justified only as an exercise of the spending power. How such avoidance of judicial review would be accomplished is a matter of conjecture. Perhaps the doctrines of "political question" or "lack of sufficient pecuniary interest" used effectively in *Massachusetts v. Mellon*[27] could be expanded to fit the eminent domain cases. Again the Court might say that discretion belongs to Congress, unless "the choice is clearly wrong, a display of arbitrary power."[28] It has even been suggested that to effect such avoidance the Supreme Court should refuse to pass upon the constitutionality of federal action.[29]

If the courts insist that the eminent domain function may not supplement the spending power, the federal government might still accomplish numerous ends similar to those accomplished in the instant cases by conditioning the award of grants-in-aid upon compliance by the states with terms dictated by federal administrators.[30]

Damages—Mitigation of Compensatory Damages—[Georgia].—When threatened with a suit for injury from the presence of a foreign substance in a bottle of Coca-Cola, the defendant Coca-Cola Company procured the installation of a device in the plaintiff's hospital room which enabled the defendant's agents to listen to and record private conversations between the plaintiff and her husband, doctors, nurses, and friends. The plaintiff sued for invasion of her right of privacy. The defendant sought to justify its conduct on the basis of its right to protect its property against the plaintiff's allegedly false claim of damage. The court *held* that although the plaintiff's claim and threatened suit did not justify the defendant's intrusion, the facts might be pleaded in mitigation of damages. *McDaniel v. Atlanta Coca-Cola Bottling Co.*[1]

It would seem that the court's refusal to allow the plaintiff's conduct to justify the defendant's invasion is adequately supported by a strong social attitude against invasions of privacy.[2] The Georgia court's decision that mitigation be allowed was based on a state statute precisely in point;[3] however, a Wisconsin court has reached a contrary result under a statute permitting, in an action for libel or slander, use in mitiga-

[27] 262 U.S. 447 (1923). [28] Helvering v. Davis, 301 U.S. 619, 640 (1936).

[29] Nicholson, Federal Spending Power, 9 Temple L. Q. 3, 24 (1934). In the interest of securing uniformity, it appears to be desirable that there be review by the federal judiciary of the constitutionality of state legislation.

[30] Missouri Utilities Co. v. California, 8 F. Supp. 454, 464 (Mo. 1934). Corwin, Spending Power of Congress, 36 Harv. L. Rev. 548, 577 (1923).

[1] 2 S.E. (2d) 810 (Ga. App. 1939).

[2] Conventional delineations of the rules guaranteeing privacy are broad and supported by strong statements of policy. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890); Kacedan, The Right of Privacy, 12 Boston U. L. Rev. 353 (1932). Pavesich v. New England Life Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905); Rhodes v. Graham, 238 Ky. 225, 37 S.W. (2d) 46 (1931).

Eavesdropping was an indictable nuisance at common law, 2 Wharton, Criminal Law § 1718 (12th ed. 1932). In Georgia, at least, eavesdropping has been condemned by statute as well, Ga. Code (1933) § 26–2001.

[3] Ga. Code (1933) § 105–1802: "Circumstances not amounting to justification may be pleaded in extenuation and mitigation of damages."

tion of evidence denied effectiveness as a justification.[4] If the position of the court denying justification is a sound one, use in mitigation of damages of the identical evidence denied credence as a justification, would seem to be undesirable. The court in effect is permitting justification, since to say that the defendant is wholly unjustified in inflicting injury, but need not pay damages for the injury or need pay only nominal damages, is to do by indirection what is not permitted directly. It is noteworthy that in the principal case the jury, after being permitted to hear the evidence in mitigation, brought in a verdict for the defendant.[5]

Under the better view evidence in mitigation of damages is not permitted to mitigate compensatory damages actually sustained.[6] It is correctly permitted either to prevent assessment of greater compensatory damages than were sustained,[7] or to prevent assessment of punitive damages.[8] It is probable that in the principal case the court was not motivated by the desire to prevent assessment of greater damages than the plaintiff actually suffered; nor, unless the conclusion is accepted that all damages permitted for invasion of privacy are punitive in nature, could the court have been motivated by the desire to prevent assessment of punitive damages. By use of the mitigation technique, the court permitted mitigation of compensatory damages actually sustained in order either to punish the plaintiff by reduction of his recovery (in effect cross assessment of punitive damages), or partially to justify the conduct of the defendant. That is, the court permitted mitigation either because the plaintiff's fault was such that he did not deserve full recovery, or because the defendant's conduct was not so blameworthy as to require subjection to full liability.

To allow mitigation predicated on the fault of the plaintiff has serious implications. A premium is placed upon invasion of privacy, by offer of at least partial amnesty, if fault in the plaintiff can be discovered. Even commission of a crime does not bar the door of a court to the plaintiff;[9] it would seem that recovery should not be denied for an admitted wrong on the ground that the plaintiff was contemplating a civil tort. The analogy of the doctrines of contributory and comparative negligence, through which

[4] Wis. Stat. (1937) § 263.38: "In an action for libel or slander the defendant may in his answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of the damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances." The court stated that this did not permit mitigation of compensatory damages actually suffered, Candrian v. Miller, 98 Wis. 164, 73 N.W. 1004 (1898).

It should be noted, however, that the Georgia provision is contained in the section on Torts, while the Wisconsin statute is in the section labeled Pleadings.

[5] McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E. (2d) 810, 814 (Ga. App. 1939).

[6] 63 A.L.R. 890 (1929).

[7] Duval v. Davey, 32 Ohio St. 604, 612 (1877); Craney v. Donavan, 92 Conn. 236, 102 Atl. 640 (1917).

[8] Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N.E. 1 (1891); Clair v. Battle Creek J. Co., 168 Mich. 467, 473, 134 N.W. 443, 445 (1912); Rearick v. Wilcox, 81 Ill. 77 (1876); Taylor v. Hearst, 118 Cal. 366, 50 Pac. 541 (1897); Massee v. Williams, 207 Fed. 222 (C.C.A. 6th 1913). "Mitigating circumstances are those that affect the basis for an award of exemplary damages, or reduce actual damages by showing not that they were never suffered, but that they have been partially extinguished," McClelland v. Climax Hosiery Mills, 252 N.Y. 347, 358, 169 N.E. 605, 609 (1930).

[9] Brandeis, J., in Olmstead v. United States, 277 U.S. 438, 484 (1928).

a plaintiff is deprived of his action because of his own wrong, should be mentioned in order to be distinguished. There the negligence of the plaintiff and the defendant contribute to a single injury; here the torts of the plaintiff and the defendant each caused a separate injury. The most persuasive argument in favor of the position of the court is the suggestion that punitive damages should be mutual.[10] This view has been refuted by Sutherland,[11] particularly on the convincing ground that "aside from the ultra refinement it involves, ... the plaintiff is punished without cause—he may not have violated the law." Furthermore, if the plaintiff has committed a legal wrong, the defendant may prosecute a separate action. In refutation of the contention that it is desirable to settle all problems in one suit, it is submitted that the issue is confused by presentation of two different inquiries in a single lawsuit; the attention of the jury is directed to the plaintiff's fault, to the neglect of his injury.

Mitigation predicated on the fact that the defendant is not blameworthy would seem equally undesirable and perhaps anomalous. To allow the blamelessness of the defendant to triumph completely, mitigation must be permitted, whether or not the plaintiff is actually innocent of wrong, in every case in which a suit is contemplated the bona fides of which the defendant justifiably doubts. This is obviously unjust to innocent litigants. If, on the other hand, the fact that the defendant is not blameworthy is permitted to mitigate damages only when the plaintiff is actually guilty of wrong, then the test of the defendant's merit is placed on an external factor over which he has no control. To the suggestion that the defendant should be permitted to shoulder this risk, the refutation is again that such a decision places a premium on risking commission of an admitted wrong.

In justice to the Georgia position it must be granted that the result is to some extent persuasive. The Coca-Cola Company, and many other purveyors of food and drink, have been harassed by a multitude of fictitious claims; a weapon is here placed in their hands to enable effective defense. An extremely flexible scale of damages permits the jury to allow more accurately a recovery commensurate with justice under all the facts. While it is likely that few would attempt to argue that the plaintiff's conduct should be permitted to be pleaded in a burglary action or even in a civil suit for battery, desire to maintain the right of privacy may not be as powerful as the desire to protect against fictitious claims.

Perhaps the circumstance that creation of the tort was comparatively recent is indicative of absence of strong motivating policy. Certainly qualification of early expressions of its strength would not conflict with a powerful momentum. The jury is given an opportunity to balance the social values of the conflicting interests here involved as reflected in the mores of the people. Under this view, the case is an example of the ritualistic function of the law.[12] In denying justification the court celebrated the sanctity of the right of privacy, and conventional consistency; in permitting mitigation it allowed the mores of the people to be effective.

Labor Law—Anti-injunction Act—Enjoining All Picketing after Violence Occurs— [New York].—Members of the defendant union committed several acts of violence while picketing the plaintiff's premises during a labor dispute. *Held*, notwithstanding the

[10] 16 Harv. L. Rev. 591 (1903).

[11] 4 Sutherland, Damages § 1255 (4th ed. 1916).

[12] Arnold, Symbols of Government c. ii (1935).