
Edward F. Siegel

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RECENT CASE

CONSTITUTIONAL LAW — SEVENTH AMENDMENT — RIGHT TO JURY TRIAL IN SECTION 1983 DAMAGE ACTIONS

Lawton v. Nightingale,
345 F. Supp. 683
(N.D. Ohio 1972).

In Lawton v. Nightingale, a federal district court held that the seventh amendment right to jury trial does not apply to an action for money damages brought pursuant to section 1983, the Civil Rights Statute. Relying in part on the premise that the policy of this statute could be defeated by a jury drawn from a hostile community, the court denied the defendants' timely demand for a jury trial. Despite extensive commentary on juries in general there has been little discussion of the precise question presented in Lawton. Because the decision suggests the major arguments surrounding this issue, it will be used here as a vehicle to investigate this previously unexplored area.

The occurrences that led to the Lawton decision began on a weekend in November 1970, when Charles Lawton, a high school senior, was arrested for selling narcotics and placed in detention at the Toledo Child Study Institute. The following Monday a detention hearing was held and he was released in the custody of his parents. The next morning the plaintiff returned to school but was denied admission by the defendants, members of the school's administration. At least one of these administrators told the plaintiff that he was a "germ whose presence would infect the school body."

2 U.S. Const. amend. VII, provides:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
Subsequently, the plaintiff brought an action under section 1983 seeking both to enjoin the school from denying him admittance and to recover money damages. A preliminary injunction was granted, and after the defendants applied for and were denied a stay of the injunction, they the only issue remaining was that of damages. The defendants first moved for a summary judgment on this issue on the theory of sovereign immunity, and, after this was denied, they filed a timely demand for a jury trial.

Although Judge Young stated several reasons for denying defendants' demand, it is clear that "policy" was the major rationale underlying the decision. The decision was premised upon the fear that granting the defendants' motion would "totally defeat the purposes of §1983." Reliance on the purposes of section 1983 is misplaced, however, for no clear indication of the precise purposes for which the section was enacted can be gleaned from the legislative history of its predecessor Act. The court, therefore, could not

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6 Id.
8 345 F. Supp. at 684.
9 The current section 1983 can trace its origins to section 1 of the Ku Klux Act of 1871 which was enacted after President Ulysses S. Grant sent Congress a special message urging the passage of legislation to deal with "A condition of affairs which now exists in some States of the Union rendering life and property insecure." CONG. GLOBE 42d Cong., 1st Sess. 244 (1871). The President was referring to the rising tide of terrorism in the Southern States led by the Ku Klux Klan, which had been established in 1866. The purpose of section 1 of this Act might have been "to provide civil and criminal sanctions to deter infringements upon civil rights." 1 B. Schwartz, STATUTORY HISTORY OF THE UNITED STATES, CIVIL RIGHTS 591 (1970). However, there is a dearth of legislative history despite the hundreds of pages of recorded debate on the Act. There was no committee report on the Bill and much of the floor discussion centered on the truth or falsity of the allegations of widespread violence in the Southern States. See generally CONG. GLOBE 42d Cong., 1st Sess. (1871).

Also found within the debates over the Act is an indication that at least one member of Congress shared the same apprehension that Judge Young apparently felt. Mr. Hoar of Massachusetts stated:

Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor
enumerate what the purposes underlying the section are, but did state that, "[i]f a jury could be resorted to in actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views."\(^{10}\) The court further suggested that even a change of venue would not effectively counter these potentially adverse public attitudes.\(^{11}\)

It therefore appears that the primary motivation behind denying the defendants' jury demand was a mistrust of the jury's ability to deal with the potentially emotional and inflammatory issues presented by 1983 actions. These arguments are, of course, often advanced by those whose views are antithetical to the views of the majority of the populace from which juries are drawn. Similar feelings of mistrust have, at times, led the Supreme Court to question the jury's capacity to exclude certain facts from its deliberations\(^{12}\) and to remain completely impartial. But the Court's decisions on this subject have been far from consistent.\(^{13}\) Furthermore, the end result of such decisions was merely to take certain issues away from the jury; the right to trial by jury was not affected.

It is undoubtedly true that many plaintiffs will be greatly inconvenienced by granting a defendant's demand for a jury trial in a section 1983 action and some may be subjected to the vagaries of a prejudiced jury.\(^{14}\) And although the denial of a jury trial in a case

\(^{10}\) 345 F. Supp. at 684.

\(^{11}\) Id. at 685.


\(^{14}\) See New York Times v. Sullivan, 376 U.S. 254 (1964) for an example of juror bias. In this case the Court reversed the jury verdict against the New York Times on first amendment grounds. The jury had awarded the local police commissioner a substantial amount of money in his libel action against the newspaper.
like Lawton would probably be more in tune with the functional purpose of the statute, these policy reasons alone are insufficient to overcome the compelling logic and precedent in favor of granting a jury trial.

Although few courts have specifically dealt with the applicability of jury trials to section 1983 actions, the general question of the right to jury trial has been dealt with at length by both courts and commentators, many of whom have been highly critical of the jury system. Notwithstanding this criticism, the Supreme Court has been quite adamant in its defense of the jury trial in civil cases. It has characterized this right as a basic and fundamental feature of our system of jurisprudence which "should be jealously guarded by the courts." 

Despite the Supreme Court's affirmation of the historical presumption in favor of a civil jury, Judge Young made several inter-

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17 One commentator has estimated that over three hundred articles have been written on the subject. Broeder, Memorandum Regarding Jury Systems, Hearings on Recording of Jury Deliberations Before the Subcomm. to Investigate the Internal Security Act of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess. 64 (1955).

18 Criticism of the civil jury system generally focuses on: (1) the inordinate amount of time that it consumes, see, e.g., H. Kalven & H. Zeisel, DELAY IN THE COURT (1959), thereby imposing a crushing burden upon the courts and excessive delays in the criminal calendar; (2) the type of case in which a jury is generally demanded (mainly personal injury and products liabilities actions) see, e.g., O'Connell, Jury Trials in Civil Cases?, 58 Ill. B.J. 796 (1970); and (3) the fact that England has abolished the civil jury in all but a few situations without raising any serious or sustained opposition. The Administration of Justice (Miscellaneous Provisions) Act, 1933, 23 & 24 Geo. 5, c. 36, § 6. See Ward v. James [1965] 1 All E.R. 563.

The late Judge Frank was one of the most prominent of these critics. He discussed three theories as to how juries function. The naive theory is that the jury merely finds the facts; that it must not, and does not, concern itself with the legal rules, but faithfully accepts and acts according to the directions of the trial judge. A second more sophisticated theory suggests that the jury not only finds the facts but, in its jury-room deliberation uses legal reasoning to apply to those facts the legal rules it learned from the judge. The third or "realistic" theory is based on what anyone can discover by questioning the average person who has served as a juror — namely that often the jury is neither able to, nor does it attempt to, apply the instructions of the court. The jury is more brutally direct. Once they determine that Jones should collect $5000 from the railroad company, or that pretty Nellie Brown should not go to jail for killing her husband, they bring in their general verdict accordingly. Often, according to this third view the judge's careful statement of the legal rules is superfluous ornamentation. J. Frank, COURTS ON TRIAL 110-11 (1949).

esting, but rebuttable, legal arguments to support his policy decision. First, he rejected the defendants' argument that the issue was governed by *Beacon Theatres v. Westover*¹⁹ and *Dairy Queen, Inc. v. Wood*²⁰ dismissing these cases as being a mere "gloss" upon the seventh amendment.²¹

Prior to *Beacon Theatres*, where legal and equitable issues in a case were factually related, the crucial question of whether a judge or jury would hear the facts was generally decided by the "basic nature of the issues" involved.²² If the complaint, read as a whole, presented basically equitable questions, all of the issues were determined by a judge sitting without a jury even if "legal" issues were present. The holding of *Beacon Theatres* fundamentally modified this approach.

*Beacon Theatres* was originally a suit for declaratory relief brought by Fox West Coast Theatres, Inc., against Beacon alleging a controversy arising under sections 1 and 2 of the Sherman Antitrust Act²³ and section 4 of the Clayton Act.²⁴ Beacon counterclaimed, charging Fox with violating the antitrust laws, and demanded a jury trial. The district court denied this request, ruling that the issues raised by Fox's complaint were essentially equitable and should be tried to the court before jury consideration of Beacon's counterclaim. The Supreme Court reversed, noting that common issues pervaded both the complaint and the counterclaim and that Beacon could not be deprived of its jury trial right merely because "Fox took advantage of the availability of declaratory relief to sue Beacon first."²⁵

The Court emphasized that since legal and equitable causes could be joined in one action under the Federal Rules of Civil Procedure, "the issues between these parties could be settled in one suit giving Beacon a full jury trial of every antitrust issue."²⁶ It was, therefore, improper to force Beacon to split its case, "trying part to a judge

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²¹ 345 F. Supp. at 684.
²⁵ 359 U.S. at 504.
²⁶ Id. at 508.
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and part to a jury."\(^{27}\) The Court did note that where it was impossible to protect a party seeking equitable relief while at the same time affording a jury trial on the legal questions involved, a court, in its discretion, could separate the claims and try the equitable issues first. But the Court left no doubt as to the narrowness of this exception: "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial."\(^{28}\)

Thus \textit{Beacon Theatres} shifted the "basic nature of the issues" test from the presence of a basis for equitable relief to the presence of a legal issue. Where a legal claim is involved, \textit{Beacon Theatres} dictates that the right to a jury trial may be denied only under the "most imperative circumstances."\(^{29}\)

Two years later, in \textit{Thermo-Stitch Inc. v. Chemi-Cord Processing Corp.},\(^{30}\) Judge Wisdom construed \textit{Beacon Theatres} to mean that it made no difference whether the equitable cause clearly outweighed the legal cause, even to the extent that the basic issue of the case taken as a whole was equitable. "As long as any legal cause is involved, the jury rights it creates control."\(^{31}\) This interpretation was subsequently endorsed in \textit{Dairy Queen}, where the Supreme Court stated that the holding in \textit{Beacon Theatres} applied even if the trial judge chose to characterize the legal issues as only "incidental" to the equitable issues. "\textit{Beacon Theatres} requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury."\(^{32}\) These three cases clearly indicate that characterization of the overall action as legal or equitable will not control the granting of a motion for a jury trial. When legal and equitable claims co-exist a jury trial is mandated,\(^{33}\) absent the "imperative circumstances" exception of \textit{Beacon}. \textit{A fortiori}, where there is only a legal claim involved in an action, the right to trial by jury cannot be denied.

The Court further clarified the \textit{Beacon Theatres-Dairy Queen}

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\(^{27}\) Id.

\(^{28}\) Id. at 510 (footnote omitted).

\(^{29}\) Id. at 511. The Court did not elaborate on what it meant by the elusive phrase "imperative circumstances." Apparently the Court added the qualification for a possible future dilemma, since it noted that "in view of the flexible procedures of the Federal Rules we cannot now anticipate" such circumstances. \textit{See note 68 infra.}

\(^{30}\) 294 F.2d 486 (5th Cir. 1961).

\(^{31}\) Id. at 491.

\(^{32}\) \textit{Dairy Queen}, Inc. v. Wood, 369 U.S. at 473.

approach in *Ross v. Bernhard*, when it stated that "'[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action.'" Any question concerning the legal nature of the issue before the *Lawton* court — damages — is amply answered both by precedent and by an analysis of the test set forth in *Ross*: "'[T]he 'legal' nature of an issue is determined by considering, first, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries.'"

The analysis mandated by the first part of the *Ross* test requires "extensive and possibly abstruse historical inquiry [and] is obviously the most difficult to apply." It would appear that this test may be satisfied in at least two ways: (1) by finding a contemporary exposition of what the custom was, or (2) by making an independent determination of whether similar actions were previously characterized as legal or equitable, that is, by fitting the action under consideration into its nearest historical analogy. The application of this twofold historical analysis is also helpful because, after summarily dismissing *Beacon Theatres* and *Dairy Queen*, the court in *Lawton* looked to the language of the seventh amendment and argued that "'[i]t cannot be pretended that the present action is a 'Suit at common law' ' to which the amendment speaks." However, in applying the first part of the *Ross* test it becomes clear that the action involved in *Lawton* was indeed a suit at common law.

In an early case, *Parsons v. Bedford*, the Court recognized that in almost every state there existed legal remedies that differed from the old common law forms of action, and that new rights and remedies would inevitably arise that could not be forced into one of the rigid common law molds. The Court, determining that the Constitution was to be a living rather than static organism, held that by "common law" the framers of the seventh amendment meant not merely suits that the common law recognized among its old and settled proceedings, but

\[\text{... suits in which legal rights were to be ascertained and determin-}\]

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85 Id. at 538 (emphasis added).
87 396 U.S. at 538 n.10.
88 Id.
89 345 F. Supp. at 684.
90 28 U.S. (3 Pet.) 433 (1830).
mined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.41

Under this reasoning, Lawton clearly falls within the ambit of the seventh amendment since the only question is one of damages, and neither admiralty nor equity is involved.

Another method of determining the "pre-merger custom" is to attempt to fit the cause of action into its nearest historical analogy.42 One of the nearest is a suit seeking damages for the deprivation of a voting right. The right to vote is one of the most cherished and vital of all civil rights, and courts have been extremely sensitive to any potential infringement of that right.43 The right to recover damages for the deprivation of voting rights was assured as early as 1703. In Ashby v. White,44 the plaintiff was allowed to recover damages from an election officer who refused to admit his vote in an election for members of Parliament. In the decision, Chief Judge Holt said: "This right of voting is a right in the plaintiff by the common law and consequently he shall maintain an action for the obstruction of it."45 This historical analogy reveals that according to the custom in 1791, a suit for damages arising from a deprivation of civil rights, was, indeed, a suit at common law, and therefore falls within the protection of the seventh amendment.

But it is not necessary to rely solely on antediluvian decisions to conclude that for seventh amendment purposes a suit at common law includes the right to recover damages for deprivation of one's civil rights. In Wiley v. Sinkler,46 for example, the Supreme Court agreed that a suit seeking damages for a violation of one's voting right "arose under" the Constitution. Although the action was dismissed because the complaint failed to state facts sufficient to constitute a cause of action, the Court noted in dictum that the amount of damages recoverable was "peculiarly appropriate for the determination of a jury."47

41 Id. at 447.
45 Id. at 954, 92 Eng. Rep. at 136.
46 179 U.S. 58 (1900).
47 Id. at 65. See also Swafford v. Templeton, 185 U.S. 487 (1902) (action states bona fide federal question).
Giles v. Harris, an action brought pursuant to a precursor of the current section 1983, presented the Court with the question of whether the circuit court had jurisdiction to entertain a bill in equity for the deprivation of voting rights. Although the Court held that political wrongs are without the traditional limits of equity, and that, therefore, equitable relief could not be granted, it stated that it was "not prepared to say that an action at law could not be maintained on the facts alleged in the bill," and indicated that damages was an appropriate remedy.

The culmination of this line of reasoning is found in Nixon v. Herndon, in which it was held that the deprivation of voting rights was actionable and that damages could be recovered because the Court found it "hard to imagine a more direct and obvious infringement of the Fourteenth Amendment" and because private damages had been recoverable in a suit at law since Ashby v. White.

Therefore, both the "historical analogy" and the "contemporary exposition" methods of determining pre-merger custom lead to the same conclusion: an action for deprivation of civil rights is a suit at common law. It is therefore doubtful whether the Lawton court was correct in assuming that merely because the action was brought pursuant to section 1983 it was not a suit cognizable at common law, and, therefore, not included within the protection of the seventh amendment.

The second part of the Ross test for determining the legal nature of an issue is to examine the nature of the remedy being sought. In Lawton the remedy sought was damages. In Dairy Queen, Mr. Justice Black speaking for the Court, agreed with the petitioner that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal." The Court left no doubt as to this issue: "[W]e think it plain that [petitioner's] claim for a money judgment is a claim wholly legal in its nature.

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48 189 U.S. 475 (1903).
49 Rev. Stat. § 1979. The language of the two statutes is virtually identical.
50 189 U.S. at 486.
51 Id. at 485.
52 Id. at 488.
54 Id. at 541.
55 Id. at 540.
56 See text accompanying note 37 supra.
57 369 U.S. at 476 (emphasis added).
however the complaint is construed."

Although no authority was cited by Mr. Justice Black for this proposition, numerous pre- and post- merger decisions have stated that if there is a prayer for a money judgment the action is one at law for the purpose of determining the right to jury trial. The only issue before the Lawton court was one of damages, and "where damages constitute the sole relief sought, the action is legal in character and there is normally a constitutional right of jury trial."

The third part of the Ross test, relating to the practical abilities and limitations of juries, is an extremely "gray" area of the law. Although the Lawton court did not discuss Ross, it may have tacitly given great weight to this factor in reaching the conclusion that jury trials were inappropriate in section 1983 actions.

This part of the test, however, is of questionable value for several reasons. Perhaps the most difficult problem is its ambiguity. Exactly what does "practical abilities and limitations of juries" refer to? If it refers to mistrust of a jury's logical ability to make subtle legal distinctions and to exclude certain facts from its consideration, then it seems to afford no weight at all to the Lawton position. If, on the other hand "practical . . . limitations" refers to human susceptibility to emotional prejudice, it might be worthy of more weight. This emotional weakness, however, can be ascribed to all juries and it would seem inappropriate to emphasize human shortcomings in this isolated instance.

Second, it is doubtful that the third part of the Ross test is of constitutional stature. The jury's "practical abilities and limitations" have never been a part of the historical seventh amendment test. The third part of the Ross test was announced in a footnote,

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58 Id. at 477 (emphasis added). See Ross v. Bernhard, 396 U.S. at 542.
61 See text accompanying note 33 supra.
62 See notes 15-18 supra & accompanying text.
63 See notes 12-13 supra & accompanying text.
64 See notes 12-13 supra & accompanying text.
but was never mentioned in the reasoning of the case, which was bottomed squarely on seventh amendment grounds. Thus there is serious question whether this factor can be employed as anything more than a makeweight.

Another difficulty with the Ross opinion is that it fails to indicate how the three parts of its jury test are to be weighted and applied, and presumably any one of the three parts could be disregarded. In Ross, for example, in analyzing the “nature of the issue” involved, the Court made no reference to the competence of juries to handle such claims.

The vagueness of the “practical limitations” factor, coupled with the clear mandate of the other two tests in favor of empanelling a jury indicates that the defendants’ timely demand for jury trial in Lawton should have been granted.

Another reason given by the Lawton court for denying the jury trial request was that it is “well established that the various special statutory actions which have been created from time to time since the adoption of the Seventh Amendment do not come within the meaning of the common law.” The inference to be drawn from this is that if a special statutory action is created, no right to a jury trial exists. This inference can best be rebutted by an examination of the very statutes cited by the court: the Sherman Act, Clayton Act, Securities Act of 1933, and the National Labor-Management Reporting and Disclosure Act.

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67 396 U.S. at 542.

68 One might argue that Ross and Beacon Theatres can be read to permit a jury trial in a situation such as Lawton. The argument would be that the Lawton situation fits within the “most imperative circumstances” exception in Beacon, see note 29 supra, since the purposes of section 1983 could be totally defeated by the use of a jury. This is unconvincing, however, for the Court stated that it could not anticipate at the time of Beacon such imperative circumstances. Because the procedure followed in Lawton was not uncommon, and the effect of Beacon on section 1983 damage actions was certainly foreseeable, it is unlikely that such circumstances could be considered unanticipated and within the exception. However, if it is somehow argued that the possible jury prejudice in 1983 actions is one of the circumstances which the Court in Beacon Theatres did not anticipate, and that the “practical abilities and limitations” of juries of Ross refers to human shortcomings such as prejudice, then a court might be convinced that a jury trial should be denied in 1983 actions.

69 345 F. Supp. at 684.


(1) The Sherman and Clayton Acts: In addition to the fact that *Beacon Theatres* involved these statutes, in *Fleitmann v. Welsbach Co.*, the Supreme Court noted in dictum that when a penalty of treble damages is sought, these statutes should not be read as "attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it provides the latter remedy and it provides no other." This language was later referred to in *Beacon Theatres* to demonstrate that the right to jury trial is an integral part of the congressional scheme for making competition rather than monopoly the rule of trade and that the "Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions."

(2) The Securities Acts: Prior to 1970, there was a split in the circuits as to whether certain issues arising in stockholder's derivative actions, traditionally cognizable in equity, were to be treated as legal or equitable. Some circuits held that a derivative action was entirely equitable, while another found certain issues within these actions to be legal in nature. In deciding that the seventh amendment *does* guarantee the right to jury trial in a stockholder's derivative action brought under the Investment Company Act of 1940, the Court in *Ross* held that "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury." The Court there developed the "nature of the issue" test for determination of the right to jury trial. Now, with any private right of action cognizable by the federal courts in which a legal issue exists, there is little doubt as to the need to empanel a jury should one be requested.

That the right to jury trial exists in actions under the securities

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74 See notes 23-24 supra & accompanying text.
75 240 U.S. 27 (1915).
76 Id. at 29.
77 359 U.S. at 504.
78 Although *Lawton* cited only the Securities Act of 1933, this discussion will deal with the federal securities acts in general.
83 See notes 34-35 supra & accompanying text.
acts is also apparent in *Myzel v. Fields*, which involved a claim seeking recission or damages under Securities and Exchange Commission rule 10b-5. Since the plaintiffs had disposed of their stock, the trial court treated the action as one at law for money damages. In affirming the grant of a jury trial, the Eighth Circuit stated: "In their complaint and throughout the trial, the plaintiffs insisted upon their right of trial by jury, and the [district court, relying upon *Dairy Queen and Beacon Theatres*] properly refused to strike the case from the jury docket."  

(3) Labor-Management Reporting and Disclosure Act of 1959: In *Simmons v. Local 713, Textile Workers Union*, the defendant had not objected to plaintiff's jury demand until after the verdict had been rendered. After affirming the district court's denial of the objection as untimely, the Fourth Circuit noted that:  

We are of the opinion that the plaintiff was entitled to a jury trial. The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages.  

The apparent reason underlying the reluctance of most courts to limit the availability of a jury in statutory actions was articulated in *United States v. Jepson*. The court there held that the right to a jury trial in an action for debt prevails regardless of the fact that the action is brought under a statute: "To hold otherwise would be to open the way for Congress to nullify the Constitutional right of trial by jury by mere statutory enactments."  

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84 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).
86 386 F.2d at 741.
87 350 F.2d 1012 (4th Cir. 1965).
88 Id. at 1018, citing, inter alia, *Beacon Theatres*. Contra, McCraw v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Indus., 341 F.2d 705 (6th Cir. 1965).
91 Id. at 986.
ing cuts strongly against the distinction that the *Lawton* court draws between a special statutory action and a suit at common law.\footnote{As society and the law change, an array of actions will undoubtedly develop that neither existed at common law nor analogize easily to any common law action. If Judge Young's logic were to be extended, Congress could eliminate the right to jury in these new actions. This elimination of the jury on historical grounds, however, would be inconsistent with the spirit of the seventh amendment and the functional purpose of the jury.}

Each of the statutes cited by the *Lawton* court and discussed above deals with a relatively small, narrowly circumscribed area of the law, that requires a degree of sophistication for comprehension. By comparison, section 1983 deals with the area of "civil rights," specifically the "deprivation of any rights, privileges or immunities secured by the Constitution and laws," which can hardly be depicted as either narrow or small.

Furthermore, the language of section 1983 encompasses "proceedings in equity, actions at law, or other proper proceeding for redress." If the words that Congress deliberately adopted are to be given their natural meaning and not tortured beyond recognition for policy reasons, the inescapable conclusion is that Congress anticipated that actions at law would be brought pursuant to this statute and that the normal accoutrements of such an action, such as a jury trial, would attach. It is doubtful whether the drafters of this legislation felt a need to spell out the obvious proposition that a suit in equity would be before a judge sitting without a jury, and that an action at law would be before judge and jury if the jury demand were timely made.

There have, however, been lower court decisions holding that no right to jury trial existed in an action brought to vindicate a statutory right. *McFerren v. County Board of Education*,\footnote{455 F.2d 199 (6th Cir.), cert. denied, 407 U.S. 934 (1972).} a Sixth Circuit decision cited in the *Lawton* opinion, was an appeal by a local school board from an order requiring it to rehire (with back pay) thirteen black school teachers who had been discharged. In holding that the defendants had no right to a jury trial on the issue of back pay, the court relied heavily upon the fact that the claim for back pay was wholly incidental to the equitable relief sought in this claim for reinstatement.\footnote{Accord, Harkless v. Sweeny Independent School Dist., 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971).} Although the *Lawton* court may have felt compelled to follow this Sixth Circuit decision, it can be easily distinguished from *Lawton* since the back pay demand in *McFerren* was
an integral part of the reinstatement claim, and such claims are traditionally cognizable only in equity.

A case not cited by Judge Young, Cheatwood v. South Central Bell Telephone & Telegraph Co.,\(^{94}\) in which the defendant's demand for a jury trial was denied, seems at first glance to support the Lawton position. In Cheatwood, the plaintiff allegedly suffered discrimination violative of the equal employment opportunity provisions of the Civil Rights Act of 1964.\(^{95}\) Similarly, in Cauley v. Smith,\(^{96}\) which involved, inter alia, a prayer for punitive damages in an action brought under the 1968 Fair Housing Act,\(^{97}\) the defendant was not permitted a jury trial.

In both Cheatwood and Cauley, however, the courts expressly based their decision on the statutory language involved, which either gave broad discretion to the court\(^{98}\) or expressly provided for the determination of certain issues by the court.\(^{99}\) These cases are, therefore, clearly distinguishable from an action brought pursuant to section 1983 which expressly provides for an "action at law" in addition to a "suit in equity."

Many of the opinions that deny jury trials in actions brought pursuant to statutes make valiant attempts to distinguish Beacon Theatres, Dairy Queen, and Ross. One opinion advanced the rather tenuous argument that neither Beacon Theatres nor Dairy Queen involved back pay, but that each involved separate legal and equitable claims joined in the same action and was therefore different from the case at bar.\(^{100}\) Aside from the questionable validity of such distinctions, Beacon Theatres, Dairy Queen, and Ross have made it unmistakably clear that if a legal question is involved in an action,

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\(^{98}\) 42 U.S.C. § 3612(c) provides that "the court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages..." (Emphasis added).
\(^{99}\) 42 U.S.C. § 2000e-5(g) (1970) provides:
If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). (Emphasis added).
either party is entitled to a jury for its resolution. To answer this requirement with the notion that the legal remedies are incidental to, and flow inevitably from, prior resolution of the equitable issues is no answer at all. In all actions requesting injunctive relief and damages, any resolution of the merits in favor of the plaintiff will cause the legal remedies to flow. The problem with this approach is that the Supreme Court has made it clear that juries are required to resolve all questions that bear upon the legal issues involved. Therefore, to allow a jury to decide only the amount of damages recoverable appears to be little more than an impermissible attempt to circumvent Beacon Theatres, Dairy Queen and Ross.

The final basis advanced by the Lawton court for its decision was that no precedent existed on the precise question presented. However, counsel and the court apparently overlooked Turner v. Fouche which was a section 1983 class action brought by Negroes against the local school board and jury commissioners. The plaintiffs sought a declaratory judgment and ancillary money damages. On the jury question, the court explicitly stated: "Defendants claim a Seventh Amendment right to jury trial if the question [of damages] is to be considered and we hold that there is merit in this contention." Clearly Turner should have entered into the decision-making process of the Lawton court since the court's decision is based in part on the "absence of . . . precise authority for [the defendants'] position."

It is highly unlikely that the Lawton court would have sidestepped both the obvious and subtle legal problems involved in denying the defendants' jury demand were it not for its apparent bias in favor of the policy involved. Functionally, these policies may be more closely related to the purposes of section 1983, but they are nevertheless insufficient to overcome the basic constitutional considerations surrounding jury trials which clearly point the other way. Nor are they sufficient to override the clear language of section 1983 allowing recovery in an "action at law" which, when coupled with the seventh amendment's command that "In Suits at common law . . . the right of trial by jury shall be preserved," make it imperative that if a timely demand is made in a civil rights action, a jury trial must be granted.

Edward F. Siegel

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1. 345 F. Supp. at 685.
4. 345 F. Supp. at 685.