the books of the corporation.[27] Further it is settled that a corporation may refuse to allow investigation of its books by a stockholder at times when such investigation would unreasonably interfere with the management of the business.[28] The very fact that no expenses of investigation will be allowed unless it is shown to have produced a benefit to the corporation will discourage unreasonable investigations.

It must be recognized that the present holding will encourage investigations. The requirement that there be benefit to the corporation will be a factor in limiting any abuse to which the decision may be conducive, even though the determination of whether or not there was a benefit will be a difficult question in some cases. In view of the practices in which numerous corporate officials have engaged in the past,[29] the desirability of closer supervision of their activities more than offsets the slight possibility that it will lead to burdensome investigations. Traditional concepts of corporate entity with management by officials rather than stockholders will not be substantially impaired. Instead, ownership interests will exert a legitimate influence upon those in control to assure a faithful performance of fiduciary duties.

JURIES

PEREMPTORY CHALLENGING OF NEGRO VENIREMEN AS DISCRIMINATION AGAINST NEGRO CRIMINAL DEFENDANT

Three Negroes were indicted in the Federal District Court for the District of Columbia on a charge of murder in the first degree. Nineteen members of the Negro race

27. 48 STAT. 896 (1934), 15 U. S. C. A. § 78p (a) (1940). This section makes it mandatory for corporate officials to file monthly reports with the Securities and Exchange Commission in regard to their transactions in the securities of the corporation. These reports are public records available for inspection.

28. Breslauer v. S. Franklin & Co., 205 Ill. App. 372 (1917); Weihenmayer v. Bitner, 88 Md. 325, 42 Atl. 245 (1898); Watkins v. Donnell Mfg. Co., 129 Mo. App. 206, 107 S. W. 1112 (1908); Conerty v. Butler County Oil Ref. Co., 301 Pa. 417, 152 Atl. 672 (1930); Kuhback v. Irving Cut Glass Co., 220 Pa. 427, 69 Atl. 981 (1908); 5 FLETCHER, CYCLOPEDIA CORPORATIONS § 2242 (perm. ed. 1943).

29. See *Hearings before the Committee on Banking and Currency on S. 84*, 72d Cong., 2d Sess., and on *S. 56* and *S. 87*, 73d Cong., 1st and 2d Sess., (1934); Tracy and MacChesney, *The Securities Exchange Act of 1934*, 32 MICH. L. REV. 1025, 1032 (1934).

appeared on the jury panel. The United States attorney used nineteen of the twenty peremptory challenges allotted to the prosecution[1] to reject all nineteen Negroes. No other members of the panel were challenged by the prosecution. The Negroes were found guilty and sentenced to death by the court. Upon appeal, two of the Negroes urged that the United States attorney had, by peremptorily challenging the nineteen Negro members of the jury panel, excluded Negroes from the jury in violation of defendants' rights under the due process clause of the Fifth Amendment. The United States Court of Appeals for the District of Columbia affirmed the convictions, holding that the requirements of due process were met when there was no racial discrimination in the selection of the panel. *Hall v. United States; Gray v. United States; Harris v. United States,* 168 F.2d 161 (App. D. C. 1948).[2]

Although the United States Supreme Court has made it clear that the right to a mixed jury is not guaranteed to a Negro defendant by the Constitution or by any act of Congress,[3] it has uniformly held that systematic discrimnation against Negroes in the selection of a jury panel is a violation of the rights of a Negro defendant under the equal protection clause of the Fourteenth Amendment.[4] The Civil

1. Fed. R. Crim. P., 24 (b).
2. This case has also been noted in 48 COL. L. REV. 953 (1948); 61 HARV. L. REV. 1455 (1948).
3. Virginia v. Rives, 100 U. S. 313 (1880). *See, e.g.,* Thomas v. Texas, 212 U. S. 278, 282 (1909); Martin v. Texas, 200 U. S. 316, 321 (1906); *In re* Wood, 140 U. S. 278, 285 (1891); Neal v. Delaware, 103 U. S. 370, 394 (1881).
4. Hill v. Texas, 316 U. S. 400 (1942); Smith v. Texas, 311 U. S. 128 (1940); Pierre v. Louisiana, 306 U. S. 354 (1939); Hale v. Kentucky, 303 U. S. 613 (1938); Norris v. Alabama, 294 U. S. 587 (1935); Rogers v. Alabama, 192 U. S. 226 (1904); Carter v. Texas, 177 U. S. 442 (1900); Neal v. Delaware, 103 U. S. 370 (1881); Strauder v. West Virginia, 100 U. S. 303 (1880).

   The Fourteenth Amendment, of course, is not applicable to the District of Columbia. *See* Nield et al v. District of Columbia, 110 F.2d 246, 256 (App. D. C. 1940). Although the Fifth Amendment, which is applicable in the present case, contains no equal protection clause, it is settled that in the District of Columbia the Fifth Amendment implies equal protection of laws. O'Connor v. District of Columbia, 153 F.2d 225 (App. D. C. 1946); Sims v. Rives, 84 F.2d 871 (App. D. C. 1936). In at least one case arising outside the jurisdiction of the District of Columbia a federal court has stated that the Fifth Amendment is broad enough to include the equal protection which no state may deny under the Fourteenth Amendment. *See* United States v. Yount, 267 Fed. 861, 863 (W. D. Pa. 1920). There have also been direct expressions to the effect that the due process clause of the Fifth Amend-

Rights Act has also prohibited the disqualification of citizens for jury service in federal or state courts because of race or color.[5] The Federal Government has thus directed that the jury system shall not be used as a vehicle for racial discrimination.

On the other hand, the peremptory challenge is a privilege which may be exercised without cause and which the courts are compelled to allow.[6] It may be exercised arbitrarily and capriciously.[7]

The courts have emphasized the importance of the privilege, and have vigorously protected it against any practice which might tend to weaken or destroy it.[8] Its purpose, like that of the challenge for cause, is to enable a party to eliminate from the jury those jurors who he thinks may not be of sufficient impartiality of mind to give his cause a fair hearing.

Thus the problem which faced the court was: Admitting that the peremptory challenge may be arbitrarily exercised, can it be so used by a United States attorney to exclude a Negro from a petit jury in a case in which a Negro is on trial?[9] It is the thesis of this note that a result contrary to

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ment would proscribe discrimination in the selection of the jury panel. *See* Wong Yin v. United States, 118 F.2d 667, 669 (C. C. A. 9th 1941), *cert. denied*, 313 U. S. 589 (1941). The court in the present case admits that the due process clause of the Fifth Amendment would be invokable if there had been discrimination in the selection of the panel. *See* Hall v. United States; Gray v. United States; Harris v. United States; 168 F.2d 164 (App. D. C. 1948). It follows that if it can be demonstrated that the instant conduct would be counted a denial of equal protection in the state courts, there is no refuting the logic of the defendant's argument to the effect that he has been denied the due process of law guaranteed by the Fifth Amendment. See also, Fay v. New York, 332 U. S. 261, 284, n.27 (1947).

5. 18 STAT. 336 (1875); 8 U. S. C. § 44 (1946).

6. 1 CHITT. CRIM. L.* 534. *See* Turpin v. State, 55 Md. 462, 464 (1880).

7. 4 BL. COMM.* 353; CO. LITT. *156 b. *See* Pointer v. United States, 151 U. S. 396, 408 (1894); Lewis v. United States, 146 U. S. 370, 376 (1892); People v. Webster, 362 Ill. 226, 228, 198 N. E. 322, 323 (1935); State v. Hays, 23 Mo. 287, 292 (1856); State v. Ju Nun, 97 Pac. 96, 98 (Ore. 1908); Commonwealth v. Evans, 61 Atl. 989 (Pa. 1905).

8. Gulf, Colo. and S. F. Ry. v. Shane, 157 U. S. 348 (1895); Lewis v. United States, 146 U. S. 370 (1892); Smith v. State, 4 Greene 189 (Iowa 1853); Lamb v. State, 36 Wis. 424 (1874); Schumaker v. State, 5 Wis. 324 (1856). *See* Pointer v. United States, 151 U. S. 396, 408 (1894).

9. It should be noted that in the instant case, the court did not expressly deny that discrimination had been practiced. The court's

the court's was called for, and that a reversal could be grounded upon either of two reasons. First, regardless of whether the exclusion would have been constitutional had it occurred in a state court the reversal could be justified as an exercise of the supervisory power which inheres in the courts of the federal system. Second, the reversal could be justified upon the ground that the conduct of the United States attorney in the instant case would, if practiced by a state's attorney, be a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment and that hence it is not to be countenanced in the federal system.[10] It becomes unnecessary to determine whether the United States attorney's conduct denied the Negro defendants due process of law under the Fifth Amendment, although it may be strongly argued that it did.[11]

The obvious basis for a reversal in the instant case is that the trial court allowed the peremptory challenge to be used to accomplish a result which contravenes federal policy. It has been well established that, in the federal system, the higher courts are charged with the duty of judicial supervision of criminal justice in the lower courts of the system.[12]

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attitude seems rather to have been that while discrimination is not to be tolerated in the selection of the panel it may be permissible in other phases of jury formation. "The requirements of due process were met when there was no racial discrimination in the selection of the veniremen. The government as a litigant was entitled to exercise twenty peremptory challenges, which means that its counsel could exclude from the jury that number of persons without assigning, or indeed without having, any reason for doing so. . . . We conclude, therefore, that the appellants' argument of unconstitutional peremptory challenging is wholly untenable." Hall v. United States; Gray v. United States; Harris v. United States, 168 F.2d 161, 164 (App. D. C. 1948).

10. If past experience is a valid index, the impact of the instant case will be felt primarily in the state courts, since the problem of racial discrimination in the process of jury trial has been raised almost exclusively in cases decided by those courts. In few, if any, cases has the United States Supreme Court been called upon to determine the validity of a claim of racial discrimination in the jury selection system of a federal court. This conclusion is supported by the abundant cases arising in state courts in which discrimination against Negroes in the selection of juries has been involved. These cases are collected in a comprehensive Note treating the entire problem of unfair practices in the selection of grand and petit juries, 82 L. Ed. 1053.

    The Indiana Supreme Court's vigilance in striking down discriminatory panel selection systems is evidenced by the holding in the case of Dixon v. State, 224 Ind. 327, 67 N. E.2d 138 (1946).

11. See note 3 *supra*.

12. Ballard v. United States, 329 U. S. 187 (1946); McNabb v. United States, 318 U. S. 332 (1943); Nardone v. United States, 308 U. S. 338 (1939).

In the exercise of this duty, the United States Supreme Court has constantly striven to maintain civilized standards of procedure, which standards are not satisfactorily met by observing the minimal Constitutional safeguards.[13] An example of the employment of the supervisory power is to be found in the case of *McNabb v. United States*,[14] where the Supreme Court reversed a conviction which it found to have been obtained in disregard of the policy expressed in a federal statute, regardless of whether it was obtained in accordance with due process of law. Some notion of the scope of this power is implicit in the statement that it is to be used in the implementation of federal policy. Federal policy, of course, is not compounded of judicial prejudices. What constitutes federal policy is to be learned, rather, from the Constitution, from treaties, from statutes, and from judicial pronouncements.[15]

The federal attitude respecting discriminatory practices in the selection of jurors was unmistakably laid down in the Civil Rights Act.[16] The clear intention of the framers of that statute was that no one should be deliberately excluded from jury service on account of his race or color. The policy underlying the Civil Rights Act was clearly disregarded in the instant case. Here, then, was an opportunity for the court to vindicate the principles of that legislation

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13. *See* McNabb v. United States, 318 U. S. 332, 340 (1943).

14. 318 U. S. 332 (1943). In the *McNabb* case there was introduced in evidence a confession obtained after ten days interrogation of defendants who had not been brought before a United States Commissioner or judicial officer. Reasoning that the conduct of the arresting and interrogating officers was a violation of various statutory commands requiring immediate presentment before a committing officer, the Court held that the conviction would not stand on such evidence, "quite apart from Constitution." *Id.* at 341. In view of the explicit command of the Civil Rights Act, note 15 *infra*, the argument for reversal in the instant case seems fully as strong as that which decided the Court in the *McNabb* case.

15. *See* Hurd v. Hodge, 334 U. S. 24, 35 (1948); Muschany v. United States, 324 U. S. 49, 66 (1945).

16. "No citizen possessing all other qualifications . . . prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor. . . ." 18 STAT. 336 (1875), 8 U. S. C. § 44 (1946). The constitutionality of these words of the Civil Rights Act was upheld in *Ex parte* Virginia, 100 U. S. 339 (1880).

by declaring that the conduct of the United States attorney was inconsistent with federal policy.

If the device of which the United States attorney made use in the instant case is not to become a discriminatory tool in the hands of the state prosecutors[17] it must be shown that not federal policy alone but the Fourteenth Amendment as well proscribes its use. A consideration of the limits imposed by that Amendment has importance not only because it will reveal the extent of permissible action by state courts; it will also disclose the minimum standards which federal courts, including the court in the instant case, must maintain. For, in the second of the *Restrictive Covenant Cases*, decided last Term, the United States Supreme Court announced flatly that conduct which is violative of the equal protection clause of the Fourteenth Amendment is, without more, in contravention of the public policy of the United States.[18] It follows then that if the present use of the peremptory challenge would constitute a deprivation of equal protection in the state courts its use in the federal courts is not to be permitted.

From a series of cases in which the United States Supreme Court was called upon to determine the constitutionality of state jury selection systems where there was evidence that deliberate exclusion of Negroes from the panels was being practiced, this doctrine has emerged: In cases involving Negro defendants, where such systematic exclusion is sufficiently shown, convictions will not be allowed to stand, inasmuch as discriminatory methods of jury panel selection operate to deny to defendants equal protection of the laws under the Fourteenth Amendment.[19] Although the Supreme Court decisions respecting the state practices were concerned primarily with discrimination in the selection of the jury *panel*, the prohibition of systematic exclusion embodied in them cannot be limited to the precise fact situa-

17. In several cases before state courts, use of the peremptory challenge as in the instant case withstood attacks upon its constitutionality. Watkins v. State, 199 Ga. 81, 33 S. E.2d 325 (1945); Whitney v. State, 43 Tex. Crim. R. 197, 63 S. W. 879 (1901); *accord*, People v. Roxborough, 307 Mich. 575, 12 N. W.2d 466 (1943), *cert denied sub nom.* Roxborough v. Michigan, 323 U. S. 749 (1944); *see* State v. Logan, 344 Mo. 351, 353, 126 S. W.2d 256, 258 (1939).

18. *See* Hurd v. Hodge, 334 U. S. 24, 35 (1948).

19. Cases cited note 3 *supra*.

tions of those cases. The discrimination there condemned had as its goal the exclusion of Negroes from the jury itself and the proscription of discrimination in the selection of a panel was intended to protect not simply the integrity of the panel but of the jury itself. There is implicit in those decisions an intention to prevent discrimination *of any type* in the process leading to the final seating of the twelve jurors who are to try the case.[20] The novelty of the discriminatory device employed in the present case should deceive no court into the belief that the constitutional inhibition of the "selection of the panel" cases is so narrow as not to bring within its sweep any other method of discrimination which arrives at the same end, *viz.*, the exclusion of Negroes from a jury trying a Negro.

The court in the instant case recognized the vitality of the constitutional doctrine which grounded the "selection of the panel" cases. However, concern for the preservation of the peremptory challenge in all its historical vigor moved the court to refrain from disturbing the convictions below. The majority pointed out that since a peremptory challenge is used in the *rejection* of jurors and not in their selection, it necessarily follows that misuse of the challenge could not be a violation of the injunction of the United States Supreme Court against discriminatory practices in the *selection* of the panel. Although this distinction has valid and useful application in certain types of cases,[21] it is exposed as a

20. This is a conclusion which must result from the pronouncements of the United States Supreme Court to the effect that in determining whether or not there has been a denial of a federal right, the Court will not be satisfied with a showing that there has been no express denial, but will seek to find if there has been a deprivation of the right in substance and effect. *See* Norris v. Alabama, 294 U. S. 587, 590 (1935). See also the language of Mr. Justice Black, speaking for a unanimous Court in Patton v. Mississippi, 332 U. S. 463, 465-466 (1947): "Sixty-seven years ago this Court held that state exclusion of Negroes from grand and petit juries solely because of their race denied Negro defendants in criminal cases the equal protection of the laws required by the Fourteenth Amendment. . . . a long and unbroken line of our decisions since then has reiterated that principle, regardless of whether the discrimination was embodied in statute or was apparent from the administrative practices of state jury selection officials, and regardless of whether the system for depriving defendants of their rights was 'ingenious or ingenuous.'" That ingenuity of the method selected to accomplish the discrimination will not protect it is stated by Mr. Justice Frankfurter in Smith v. Texas, 311 U. S. 128, 132 (1940).

21. Howard v. Kentucky, 200 U. S. 164 (1905); Brown v. New Jersey, 175 U. S. 172 (1899); Pointer v. United States, 151 U. S. 396 (1894); Hayes v. Missouri, 120 U. S. 68 (1887).

mere play on words when lifted out of its context and applied to an entirely different fact situation.[22] Vital questions of constitutional right should not be made to turn upon vocabulary distinctions. It is apparent that a court which expressly prohibits discrimination in one phase of the formation of the jury, and yet allows the same sort of discriminatory exclusion to go unchecked in a later phase is involved in a doctrinal inconsistency. What is more serious, the inconsistency is one which, if perpetuated, will effectively sabotage the structure of rights against discrimination in the jury system which the United States Supreme Court has erected out of its decisions in the "selection of the panel" cases.

To the court's fears that a successful assault upon the exercise of the peremptory challenge in the instant case would destroy that procedural privilege, two answers may be made. In the first place, the most inveterate rule of procedure must give way if its uninhibited operation is found to embarrass the exercise of constitutionally safeguarded rights.[23] Secondly, the fear that the peremptory challenge, as a procedural institution, would not survive a reversal in the instant case can be shown to be groundless. On this point the court concluded that to hold the actions of the United States attorney to be a violation of due process would be to deprive the prosecution of the privilege of peremptorily challenging a Negro juror in any case involving a Negro defendant. This, it was said, would extend to members of the Negro race a privilege not granted to the members of any

22. In Marchant and Colson v. United States, 12 Wheat. 480 (U. S. 1827), which is the earliest case discovered setting forth this "rule" which characterizes the peremptory challenge as a means of *rejection* of jurors, the defendants, who were jointly indicted, demanded separate trials on the ground that upon a joint trial, a juror desired by one defendant might be challenged by another and withdrawn as to all, thus impairing the asserted right to select the jury from the panel. There it was proper for the court to distinguish between selection and rejection, for it is clear that an accused person does not have the right to select the individual jurors whom he wishes to try him. He has merely the privilege of rejecting a certain number of the members of the panel which is presented him.

23. For example, notwithstanding the rule that fact finding is, in jury cases, customarily the exclusive province of the jury, the United States Supreme Court has reexamined findings of fact, where that was necessary to a determination of a question of Constitutional right. *See* Ashcraft v. Tennessee, 322 U. S. 143, 148 (1944); Lisenba v. California, 314 U. S. 219, 237, 238 (1941); Norris v. Alabama, 294 U. S. 587, 590 (1935).

other race. It is true that an unqualified reversal in the instant case might have that effect. However, had the court closely considered the technique of the United States Supreme Court in the "selection of the panel" cases, it would have discerned a means whereby the discrimination evident in the principal case might be prevented; a means, moreover, which would effect no serious dilution of the efficacy of the peremptory challenge.

Racial discrimination in the selection of the panel of jurors has been established, in a number of cases considered by the Supreme Court, in consequence of a showing by the Negro defendants that the circumstances surrounding the impaneling raise a strong inference that systematic exclusion of Negroes has been practiced.[24] In building a record from which only that inference can reasonably be drawn, the Negro defendant submits evidence that for a number of years *no* colored person has been called for jury duty. If that evidence is sufficient to show that chance or accident could not account for the absence of Negroes from the panels, the inference of discrimination is drawn, and a prima facie case for the reversal of a conviction is made out. This inference of discrimination may, of course, be explained away upon a showing by the prosecution that factors other than racial antipathy operated to exclude Negroes from the jury. The fact that in the "selection of the panel" cases the evidence adduced by the defendant must show that discrimination has taken place over a period of years, while in the instant situation the inquiry is restricted to the presence of discrimination *in one particular case*, makes it obvious that the formula used in the former type case can not be transplanted intact from that area to this one. What is suggested is that the basic approach of the "panel" cases—that is, the factual approach which seeks to discover the presence of intentional exclusion—is adaptable to and useful in the present sort of case. In the instant circumstances, the following elements would have relevance in building the case for the Negro defendant: (1) the number of Negroes appearing on the panel; (2) the number of impaneled Negroes peremptorily challenged; (3) the number of non-Negro veniremen peremptorily

24. Patton v. Mississippi, 332 U. S. 463 (1947); Hill v. Texas, 316 U. S. 400 (1942); Pierre v. Louisiana, 306 U. S. 354 (1939); Norris v. Alabama, 294 U. S. 587 (1935); Neal v. Delaware, 103 U. S. 370 (1881).

challenged; (4) and the proportion of Negroes challenged to the total number of jurors challenged.[25] Here, as in the "selection of the panel" cases, these numerical factors are significant, not in themselves, but only insofar as, if unexplained, they negative any inference other than that of deliberate discrimination.

The instant case presents the situation in which the test proposed has obvious results. It must be conceded that marginal cases might arise, in which the facts would not be conclusive in favor of the inference or against it. In such cases, the defendant's attack must fail. The same observation might be made respecting the formula used in the "selection of the panel" cases; but, the fact that the United States Supreme Court has propounded and reiterated the formula indicates that the Court regards the device, whatever its inadequacies, as a useful one. At the least it is an attempt to get at the facts and is superior to logomachy, such as that indulged in by the court in the instant case.

It may be argued that the characterization of the problem of the instant case as a constitutional question leads to the imposition upon the courts of the duty of reviewing all such cases. It might be urged that in many cases in which there is in the use of the peremptory challenge the slightest tinge of discrimination against any class, the losing party may make a plausible argument to the effect that he has suffered at the trial stage a deprivation of his constitutional rights. This, the argument will run, will vex the courts with an intolerable administrative burden. In two ways, however, it may be shown that the remedy proposed will have a limited operation, and will yet retain its effectiveness in the instant circumstances. First: The test suggested is framed in terms so restrictive that an application of it to a case greatly unlike the present one is difficult to suppose. The formula which is here proposed was conceived as an answer to a scheme for racial discrimination. It is carefully drawn to meet that problem only. Even if it be granted that the test has possible application in other Negro cases, the nar-

25. A prosecutor, bent on discriminatory exclusion, could "take out insurance" against a subsequent reversal by peremptorily challenging a decent number of white veniremen after having removed the Negroes from the panel. To meet such a maneuver, courts should be conditioned against giving too much weight to factors (3) and (4) of the proposed test.

rowness of the terms in which it is drawn insures that its adoption would not lead to a deluging of the courts with appeals for resolution of cases involving this "new" constitutional question. Second: There is a further indication that the test proposed, if adopted, would be made use of only in cases closely paralleling, factually, the instant one. This indication is to be found in the attitude which the Supreme Court has taken in jury cases where discrimination of a non-racial type has been the issue. The Court has looked to the Civil Rights Act, one portion of which makes it a crime for any officer of a state or federal court to exclude persons from jury service on account of race or color.[26] In consequence of this special legislative treatment, it is said, the cases involving the exclusion of Negroes from juries are considered as in a class by themselves.[27] It should follow that the present problem—which is only a facet of the large one with which the Civil Rights Act and the precedents deal—and its solution will be considered as concerning *only* the fact-pattern of the instant case. This analysis limits the applicability of the proposed formula to racial cases. Of those cases, some would be disposed of at once as raising no substantial question under the test. The objection that adoption of the proposed solution would overburden the courts becomes an illusory one.

It cannot be said that a reversal framed in the terms suggested makes no provision for the case in which the prosecutor in good faith believes that he cannot obtain a fair trial if the jury which is finally seated includes Negroes. The challenge for cause would continue to be available. Although a challenge for cause can not easily be made to "stick," its availability insures that the prosecution can remove from the jury those Negro veniremen whom it finds to be genuinely prejudiced.

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26. 18 STAT. 336 (1875); 8 U. S. C. § 44 (1946).

27. *See* Fay v. New York, 332 U. S. 261, 282, 283 (1947).
The uniqueness of the cases which have developed this aspect of the Civil Rights Act has led to this practical result: A defendant claiming that there was discrimination against his race in the impaneling of the jury need not show that he was harmed thereby. The discrimination alone denies him equal protection. But, if the discrimination claimed is other than racial, the defendant assumes the burden of showing that it operated to deprive him of a fair trial. *Cf.* Rawlins v. Georgia, 201 U. S. 638 (1906).