protecting recordings made prior to the effective date of the new law. Therefore, whatever remains of the unfair competition theory, or any other theory, is still an available remedy for artists and producers.

The Sound Recording Act is not unique to the United States; various European countries provided like protection previous to enactment in the United States.[79] Recently, Singapore passed legislation similar to the Sound Recording Act. Reports on that legislation indicate that the illicit copying practices have have been substantially eliminated.[80]

The deterrent effect of the Act in the United States has not yet been accurately determined. When a pirate duplicates a magnetic tape or phonograph record and further duplicates the jacket or cover, it is next to impossible to discern the legitimate from the illegitimate recording. Thus the foremost problem that remains for the recording industry is in detection and apprehension of the pirates. Once the infringer is brought into court, a comprehensive remedy is available.

DOUGLAS JOHN WILLIAMS

79. *See* Goldstein v. California, 409 U.S. 821 (1972).
80. European statutes are not all based on copyright laws—some are predicated upon unfair competition theories. *1971 Hearings, supra* note 1, at 8.
81. *1971 Hearings, supra* note 1, at 10.

Case Notes

CONSTITUTIONAL LAW—DENIAL OF GOOD TIME CREDIT TO PRISONERS FOR PRE-SENTENCE JAIL TIME AGAINST MINIMUM PAROLE DATES DOES NOT CONSTITUTE A VIOLATION OF EQUAL PROTECTION.—*McGinnis v. Royster* (U.S. 1973).

Appellees, Royster and Rutherford, were unable to post bail, and were incarcerated in a New York county jail prior to their being convicted of felonies and sentenced to state prison.[1] A New York statute,[2] which provided that prisoners could be awarded good time credit for good behavior and performance of duties in *a state prison*, denied such credit with respect to pre-sentence time served in a *county jail*. Appellees claimed that denying them such credit, while permitting it for the full period of incarceration to those prisoners who had been released on bail, deprived appellees of equal protection of the laws. A three-judge federal district court was convened[3] and upheld the appellees claim granting declaratory and injunctive relief. The district court held that the statute constituted invidious discrimination against those prisoners too poor to post bail.[4] On appeal from the federal district court the United States Supreme Court, *held*, that the state statute was designed to allow a full evaluation of an inmate's progress toward rehabilitation and, since that is a legitimate state goal, a denial of good time credit for time served in county jails which lack rehabilitative programs is reasonable. *McGinnis v. Royster*, 93 S. Ct. 1055 (1973).

The equal protection clause of the fourteenth amendment to the Constitution of the United States represented a societal response to an era of intense racial discrimination, and an attempt to make men somewhat more equal in the eyes of the law. When it was first interpreted in the *Slaughter-House Cases*,[5] the United States Supreme Court expressed doubt that its protective purview would be extended to any discriminatory laws other than those directly aimed at an individual's race. History, however, has shown the Court unwilling to hold to that qualified position and, at this point in time, the scope of the equal pro-

1. Appellee Royster had spent 404 days, and Rutherford, 242 days, of jail time awaiting their trial and sentencing. It was undisputed that had they received good time credit while in jail, appellees would have been eligible for parole nearly 4 and 3 months earlier, respectively.

2. N.Y. CORRECTION LAW § 230(3) (McKinney 1968), states:
> In the case of a definite sentence prisoner, said reduction shall be computed upon the term of the sentence as imposed by the court, less jail time allowance, and in the case of an indeterminate sentence prisoner, said reduction shall be computed upon the minimum term of such sentence, *less jail time allowance.* (emphasis added).

3. Royster v. McGinnis, 327 F. Supp. 1318 (S.D.N.Y. 1971).

4. Royster v. McGinnis, 332 F. Supp. 973 (S.D.N.Y. 1971).

5. 83 U.S. 36 (1872).

tection clause has been widened to overturn statutes found to be discriminatory on a number of different bases.[6] Furthermore, the Court has expanded the scope of that clause beyond cases of purely *de jure* discrimination against classes of individuals "officially distinguished," to those involving *de facto* discrimination, which arises when a statute, as applied, results in the unequal treatment of a class of individuals, even though such class was not labelled and designated for differential treatment.[7] This expansive application has forced the courts to develop a network of tests by which such application will be guided. Initially, a statutory classification will be tested under the "rational" or "reasonable basis" theory which, while allowing a state wide discretion in its power to classify individuals in adopting laws, demands that such classification truly reflect or relate to a legitimate state interest or goal.[8] The rationale of the reasonable basis test recognizes that while total equality of treatment under the law is an attractive ideal, it is pragmatically impossible and sometimes undesirable. Virtually every law passed creates a classification.[9] Where a classification is found to create an *invidious* discrimination, or when it violates a fundamental interest, it is incumbent upon the state to show that it has a "compelling interest" in so classifying.[10] Classifications which, to date, have been held to engender invidious discrimination and thus violate the equal protection clause are race,[11] sex,[12] alienage,[13] illegitimacy,[14] marital status[15] and indigency or wealth.[16] Fundamental interests include voting rights,[17] procreation,[18] freedom to travel[19] and

---

6. *See* notes 9 through 19, *infra*. *See also* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 3410 (1949).

7. *See* Michelman, *Foreward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 10 (1969).

8. Dandridge v. Williams, 397 U.S. 471 (1969); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). In *Dandridge*, the court stated: "We need not explore all the reasons that the State advances in justification of the regulation. . . . It is enough that the state's action be rationally based and free from invidious discrimination." 397 U.S. at 486-487.

9. Some statutory classifications are very positive in intent and effect, as well as being very necessary from a societal standpoint. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Lofty v. Richardson, 440 F.2d 1144 (6th Cir. 1971).

10. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

11. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Brown v. Board of Education, 347 U.S. 483 (1954); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948).

12. *See* Frontiero v. Richardson, 93 S. Ct. 1764 (1973); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (Sup. Ct. Cal. 1971).

13. *See In re* Griffiths, 93 S. Ct. 2851 (1973); Sugarman v. Dougall, 93 S. Ct. 2842 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

14. *See, e.g.*, Weber v. Aetna Cas. & Ins. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

15. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Illinois, 405 U.S. 645 (1972).

16. *Compare* Bullock v. Carter, 405 U.S. 134 (1972), *with* Boddie v. Connecticut, 401 U.S. 371 (1971). *But see* United States v. Kras, 93 S. Ct. 631 (1973); San Antonio Ind. School Dist. v. Rodriguez, 93 S. Ct. 1278 (1973).

17. *See, e.g.*, Harper v. State Bd. of Elections, 383 U.S. 663 (1966).

18. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

19. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

rights within the realm of criminal procedure.[20]

While it is clear that the administration and discipline of prisons is generally separate and distinct from criminal procedure, there is little doubt that the two areas often overlap and become inextricably bound together in certain situations.[21] Federal courts in times past have displayed a marked unwillingness to interfere with such administration and discipline of state prisons.[22] This position was, in both the texts of legal writers[23] and the opinions of the courts[24] labelled as "the hands-off doctrine." It is thus somewhat ironic that criminal procedure was one of the earliest areas to which the equal protection clause was applied, beginning with the landmark case of *Griffin v. Illinois*.[25] In that decision, a statute not invidiously discriminatory on its face was held invalid as a violation of the equal protection clause. The *Griffin* rule, when expanded, seemed to say that discrimination on the basis of indigency constitutes a violation of the fourteenth amendment.

That decision was unique in two ways. First, it attacked a non-affirmative discriminatory practice and second, it placed a requirement of affirmative action upon the state to remove the "natural disabilities" inherent in indigency of convicted criminals.[26] Since *Griffin*, a number of cases have followed its pronouncements and, to a certain extent, expanded them.[27] It is in light of this increasing willingness on the part of the United States Supreme Court, and federal courts in general, to intervene in the area of state criminal procedure when discrimination exists on the basis of indigency, that the instant case becomes ripe for analysis.

In *McGinnis*, the Court was relatively unresponsive to the indigent prisoners' claims that two factors—their inability to post bail and the denial of good time credit under § 230(3)—combined to effectively deny them equal

---

20. *See, e.g.*, Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963). *See also* Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), a landmark "due process" case upholding prisoners' rights with respect to humane treatment, and hearings for intra-prison punishment.

21. *See, e.g.*, Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971).

22. Such a position was exhibited by the Ninth Circuit Court of Appeals in *In re* Taylor, 187 F.2d 852, 853 (9th Cir. 1951), *cert. denied*, 341 U.S. 955 (1951), when it was stated, "it [discipline and administration of state prisons] is not within the province of the courts . . . ." *Accord*, Stroud v. Swope, 187 F.2d 850 (9th Cir. 1951), *cert. denied*, 342 U.S. 829 (1951); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).

23. B. FRITCH, CIVIL RIGHTS OF FEDERAL INMATES 31 (1961). *See also* S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 291 (1963).

24. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967); and Coffin v. Reichard, 143 F.2d 433 (6th Cir. 1944).

25. 351 U.S. 12 (1956).

26. Note, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154, 157-158 (1967).

27. Douglas v. California, 372 U.S. 353 (1963); *accord*, Tate v. Short, 401 U.S. 395 (1971); and Williams v. Illinois, 399 U.S. 235 (1970). *See also* White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972); Parker v. Bounds, 329 F. Supp. 1400 (E.D.N.C. 1971); Phipps v. McGinnis, 327 F. Supp. 1 (S.D.N.Y. 1970).

protection under the law. The court apparently assessed the situation as one involving only a simple classification by statute which was justified by the state's serious interest in the rehabilitation of prisoners. In this regard, it is interesting to note that § 230(4) allows good time credit for jail time served to be deducted from the maximum statutory release date,[28] and is inconsistent with § 230(3). It is questionable why the rationale used to allow good time credit under § 230(4) would not apply equally well to § 230(3), or, in the alternative, why the rationale denying such credit under the latter would not apply to the former. The initial question raised, then, is whether the court could correctly conclude that § 230(3) had a reasonable basis.

It is helpful to note that the federal courts, when reviewing the constitutionality of a statute which allegedly creates discriminatory classifications, have applied the rational basis test with an attitude of deference toward the legislatures.[29] Denials or forfeitures of good time to certain classifications of prisoners have been upheld as constitutionally permissible in cases ranging from parole violations[30] to poor attitude and performance while actually incarcerated.[31] The courts recognize that in every jurisdiction good time credit is a creature of statute, and the accumulation or forfeiture of it is a discretionary matter for the attorney general or a high-ranking state prison official.[32] With few exceptions,[33] good time has been held not to be a matter of right with the prisoner.[34] It has been said, however, that the courts' presumption of constitutionality might be overcome ". . . where the probable purpose [of a statute] might be constitutionally impermissible . . . [or] where the statutory classification does not relate reasonably to the most probable purpose."[35]

Assuming arguendo that the above standard should be applied, it is clear that the Supreme Court's finding of a rational purpose for § 230(3) can only be attacked on the second ground. Rehabilitation cannot be termed as "constitutionally impermissible"[36] but it does seem questionable whether or not a denial of good time credit to pre-sentence detainees actually relates to the

28. N.Y. CORRECTION LAW § 230(4) (McKinney 1968).
29. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1078 (1969).
30. *See, e.g.*, Hyland v. Department of Correction, 445 F.2d 867 (1st Cir. 1971); Phillips v. United States Board of Parole, 352 F.2d 711 (D.C. Cir. 1965).
31. United States v. Hedges, 458 F.2d 188 (10th Cir. 1972); Rodriguez v. McGinnis, 451 F.2d 730 (2d Cir. 1971); Sexton v. United States, 429 F.2d 1300 (5th Cir. 1970); Heyman v. Kropp, 24 Mich. App. 231, 180 N.W.2d 47 (1970).
32. *In re* Tobin, 130 Cal. App. 371, 20 P.2d 91 (Dist. Ct. App. 1933); Mayo v. Lukers, 53 So. 2d 916 (Fla. 1951); Scarola v. New York State Div. of Parole, 25 Misc. 2d 114, 211 N.Y.S.2d 263 (1960); Butler v. Cranor, 38 Wash. 2d 471, 230 P.2d 306 (1951).
33. Dowd v. Sims, 229 Ind. 54, 95 N.E.2d 628 (1950); Gildea v. Commissioner of Correction, 336 Mass. 48, 142 N.E.2d 400 (1957); *In re* Canfield, 98 Mich. 644, 57 N.W. 807 (1894); Neilson v. Harwood, 183 Tenn. 567, 194 S.W.2d 448 (1946).
34. *See generally* Annot., 95 A.L.R.2d 1265 (1964).
35. Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1078 (1969).
36. *Cf.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Tyree v. Fitzpatrick, 325 F. Supp. 554 (D. Mass. 1971).

rehabilitative goal. The effect of pre-sentence incarceration, generally, is to subject an individual, presumed to be innocent, to something very akin to punishment, which will often result in the loss of his job, a loss of community respect and ill feelings toward society in general.[37] In addition, though county jails admittedly are not equipped with rehabilitative materials and methods, one wonders how well-equipped the New York state prison system is in these regards.[38] The court in *McGinnis* apparently felt that it was not its function to make value judgments on the success of New York's rehabilitative machinery.

If the majority's reasoning in *McGinnis* has one glaring inadequacy, it lies in the curious shift between the first and third paragraphs of Division I of the majority opinion. The majority appeared to have begun a discussion of the prisoners' indigency and the effect of the § 230(3) classification on them, presenting two tests—the rational basis test for § 230(3) and the far more strict compelling state interest test for indigency—as possibilities for application. At that point, however, the majority launched into a discussion of the rational basis of the statute and never returned to further examine the topic of indigency. This refusal to test the classification for a compelling state interest is not understandable. As outlined earlier, prior to the instant case the court had displayed a willingness to intervene on the behalf of indigents and alleviate, as to them, some of the disparaging results of state criminal procedure.[39] In addition, denials of good time credit have been found violative of the equal protection clause as to indigents.[40] Yet, the only effective treatment of this issue in the entire opinion is found in Justice Douglas' dissent, where he labels it "a deepseated inequity"[41] and declares that the rationale of the majority opinion should be focused on indigency.[42] His reasoning finds further support in two cases which have held that a denial of "jail-time" credit toward a prisoner's statutory sentence plainly constitutes an invidious discrimination toward those too poor to meet bail.[43] Thus, once it began the discussion of indigency, the majority should have given

37. Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. REV. 641 (1964).

38. *See* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA, 33-91 (1972); *cf.* Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971).

39. *See* notes 19 and 25, *supra*, with accompanying text.

40. Pruett v. Texas, 468 F.2d 51 (5th Cir. 1972) *aff'd mem. sub. nom.* 94 S. Ct. 118 (1973); Phipps v. McGinnis, 327 F. Supp. 1 (S.D.N.Y. 1970) (a fact situation exactly on point with the instant case).

41. McGinnis v. Royster, 93 S. Ct. 1055, 1065 (1973).

42. *Id.* at 1066, where Justice Douglas, speaking of the minimum parole date, states: "To speed up the time of that hearing for those rich or influential enough to get bail or release on personal recognizance and to delay the time of that hearing for those without the means to buy a bail bond . . . emphasizes the invidious discrimination at work in § 230(3)."

43. White v. Gilligan, 351 F. Supp. 1012 (S.D. Ohio 1972); Parker v. Bounds, 329 F. Supp. 1400 (E.D.N.C. 1971). In *White*, the court was asked to determine also, the denial of good time credit for jail time served and stated: "The Court believes that if pretrial detention must be taken into consideration in computing length of sentence, then it must also be taken into consideration for all other purposes, including the awarding of good time to prisoners who faithfully observe the rules of their place of confinement." 351 F. Supp. at 1015.

that issue much more substantial treatment. Its failure to do so must certainly come as a shock to a number of legal writers who have predicted and welcomed the Court's intervention in this field.[44]

In the final analysis, *McGinnis* appears to represent a value judgment by the court, despite its language to the contrary. The court in making the above-mentioned shift and in skirting the indigency issue seemed overly impressed with the fact that § 230(3) has been changed by the New York legislature,[45] so that the number of individuals involved was finite, and the discriminatory effects no longer continue. If this assumption is correct, it follows that the majority in *McGinnis* was clearly wrong in its application of the rational basis test. Though the factual setting of the case did not involve the appellees' actual freedom from incarceration, it did involve their expectancies and hopes of being freed at a substantially earlier time. In this respect, it is possible that a fundamental interest of the individuals in question may have been violated. This, of course, is in addition to the unresolved question of discrimination against them based on indigency, outlined above. In either or both respects, the situation seemed to call for the Court's application of the "compelling state interest test" and its more strict tenets of review.[46]

It now appears to be doubtful, however, that the effect of *McGinnis* will be pervasive in future decisions of the Court. In the recent case of *Texas v. Pruett*[47] the Court was faced with a situation, similar to the one in *McGinnis*, where prisoners were denied, by statute, good time credit for jail time served during the processing of their appeals. The Fifth Circuit Court of Appeals had held that such a practice violated the equal protection clause in that it discriminated against those too poor to meet bail.[48] The Court affirmed that holding in a memorandum decision. This apparent refusal[49] by the Court to extend the *McGinnis* holding was, for two reasons, predictable. First, it is clear from the foregoing that when discrimination based on indigency has arisen in connection with criminal appellate procedure, the federal courts, in many pre-*McGinnis* decisions, reacted very unfavorably

---

44. Note, *Indigent Court Costs and Bail: Charge it to Equal Protection*, 27 MD. L. REV. 154 (1967); Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 1125 (1965).

45. N.Y. CORRECTION LAW § 230 (McKinney 1968), was repealed *in toto*. The statute now applies where the sentence to be served is for an offense prior to September 1, 1967. The penal areas formerly covered by § 230 are now covered by N.Y. PENAL LAW §§ 70.30, 70.40 (McKinney 1968), and N.Y. CORRECTION LAW § 212-a (McKinney Supp. 1972) [formerly N.Y. CORRECTION LAW § 805 (McKinney 1968)]. The new system replaces the minimum parole date with a conditional release program that eliminates the classification created under § 230(3).

46. *See* note 10, *supra*, with accompanying text.

47. Texas v. Pruett, 94 S. Ct. 118 (1973).

48. Pruett v. Texas, 468 F.2d 51, 57 (5th Cir. 1972), *aff'd mem. sub. nom.* 94 S. Ct. 118 (1973).

49. That the decision in *Texas v. Pruett* was limited to a memorandum opinion is worthy of note, here, in light of the inconsistency between the Fifth Circuit Court of Appeals decision and *McGinnis*. *See* note 48, *supra*, with accompanying text. This fact would seem to indicate that *Texas v. Pruett* represents, as stated in the text, a refusal to extend, rather than a retreat from *McGinnis* by the Court.

toward it.[50] Second, the number of individuals affected in *Texas v. Pruett* was not finite and would have continued to grow had that practice not been stopped. It is unfortunate, however, that the Court was not willing to advance the protective powers of the equal protection clause to include a number of New York's indigent prisoners, when the grounds for doing so were readily apparent.

EDWARD R. DURREE

50. *See* note 24, *supra*, and accompanying text. *See also* Douglas v. California, 372 U.S. 353 (1963).