§ 305.1. Good-Time Reductions of Prison Terms; Reductions for Program Participation.[1]

(1) Prisoners shall receive credits of [15] percent of their full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A. Prisoners' dates of release under this subsection shall be calculated at the beginning of their term of imprisonment.

(2) Prisoners shall receive additional credits of up to [15 percent of their full terms of imprisonment as imposed by the sentencing court] [120 days] for satisfactory participation in vocational, educational, or other rehabilitative programs.

(3) Credits under this provision shall be deducted from the term of imprisonment to be served by the prisoner, including any mandatory-minimum term.

(4) Credits under this provision may only be revoked upon a finding by a preponderance of the evidence that the prisoner has committed a criminal offense or a serious violation of the rules of the institution, and the amount of credits forfeited shall be proportionate to that conduct.

Comment: [2]

a. Scope. This is a revision of § 305.1 in the 1962 Model Penal Code. The revised provision creates a strong presumption that credits for good behavior will be awarded as against the full lengths of prison sentences imposed by the courts, in accordance with a fixed statutory formula. These allowances—usually called "good time" credits—may be forfeited only upon a finding by the Department of Corrections that the prisoner has committed a serious violation of prison rules or has failed to participate satisfactorily in required programming. Additional credits for participation in vocational, educational, or other rehabilitative programs—often called "earned time" credits—are also authorized by this provision. Although statutory law establishes a ceiling for the amount of earned-time credits, more particularized judgments about the specific programs that merit the award of credits, and the amounts of discounts to be attached to particular activities, are delegated to the Department of Corrections.

The 1962 provision recommended that a credit of 20 percent be subtracted from both the minimum and maximum terms of a prisoner's sentence "[f]or good behavior and faithful performance of duties." An additional credit of 20 percent was available for "especially meritorious behavior" or "exceptional performance" of duties. Because the meritorious- behavior reduction was of a type rarely granted, the operative ceiling upon good-time credits for the vast majority of prisoners under the former provision was 20 percent. This provision did not function

[1] This Section was originally approved in 2011; see Tentative Draft No. 2.

[2] This Comment has not been revised since § 305.1's approval in 2011. All Comments will be updated for the Code's hardbound volumes.

in isolation, however. The original Code also vested substantial early-release authority in the parole board. Thus, a prisoner's actual release date depended upon discretionary decisionmaking by the department of corrections under former § 305.1, and the parole board's supplementary and greater powers under former § 305.6. The combined effects of these "back-end" release authorities rendered the sentencing system in the 1962 Code a highly *indeterminate* system. That is to say, at the time of the judge's pronouncement of a prison sentence, there was much indeterminacy about what the punishment would actually be.

The revised Code reflects changed policy views, since 1962, about the configuration of back-end sentencing discretion, held either by a parole agency or corrections department. Most importantly, drawing on the most successful sentencing reforms of the last 30 years, the revised Code recommends that the release discretion of the parole board be wholly eliminated; see § 6.06(4), (5). This is a fundamental structural and institutional decision that renders the sentencing system as a whole a *determinate* system, see Appendix B, Reporter's Study: The Question of Parole-Release Authority (this draft). For most prison cases in a determinate system, there is a predictable correspondence between the sentence imposed by the court and the time actually served by the offender. One major reason for the revised Code's preference for a determinate framework is its philosophy that sentencing should be at its core a judicial process; see § 1.02(2)(b)(i) and Comment *h*. Further, a major premise of determinate frameworks is that back-end discretion is too easily exercised in arbitrary, discriminatory, vindictive, or politically driven ways. It is an important goal of § 305.1 to effectuate the underlying policies of good time and earned time while extending as little power as possible to departments of corrections to override the judgments of sentencing courts.

Despite the Code's general policy preference in favor of determinacy, certain limited and, to the extent possible, routinized mechanisms of back-end discretion are justified in a well-ordered sentencing system. Indeed, there has never been a *pure* or *absolute* determinate sentencing regime in U.S. history. The technical definition of a determinate system is one with no parole-release authority. All judicial prison sentences, even in determinate structures, are subject to potential alteration by a number of later-in-time decisionmakers. One universal qualification to existing determinate structures is the availability of good-time and earned-time credits such as those addressed in this provision. The important policy questions, in creating such laws, include how the back-end credit allowances can best serve their functions while coexisting most comfortably within the general environment of a determinate system.

Subsections (1) and (2) define separate pragmatically-grounded mechanisms for the award of sentence credits, injecting a modest degree of indeterminacy into the Code's sentencing system. Respectively, the subsections are designed to further the goals of prison discipline and offender rehabilitation.

Subsection (1) recognizes that prison officials require a degree of authority over prison durations as a tool to manage the in-prison behavior of inmates. In recognition of the perils of

back-end discretion, and to avoid undue dilution of judicial sentencing authority, this power should be granted sparingly, in an amount sufficient but not greater than needed for its purposes. For the same reasons, the power to withhold good-time credits should be narrowly defined. The credits should automatically be built into the calculation of each prisoner's release date at the outset of the prison stay. There is no magic formula for the exact quantum of available credits, but many present-day correctional systems operate with good-time discounts of 15 percent or less. Subsection (1), in bracketed language, recommends that credits in roughly this amount must be awarded to prisoners in the ordinary course, and may be forfeited only when adequate proof has established a serious disciplinary violation or new criminal offense as required in subsection (4).

Subsection (2) of revised § 305.1 encourages inmates to participate in work, educational, or other rehabilitative programming made available to them in the prison setting. The subsection's rationale is that such activities stand a reasonable chance of furthering a prisoner's rehabilitation. In empirical research, completion of in-prison programming is often correlated with a reduced risk of recidivism following release. We lack the tools to discern *which* inmates have benefited from a given program, or when the benefit has taken hold. Still, it remains good public policy to promote the use of rehabilitative tools known to benefit groups within the inmate population. As a concession to our present lack of knowledge, subsection (2) is open-ended on the questions of which programs should be made available, the amount of credits that should be offered for completion of one program or another, and other implementation details. Unlike subsection (1), corrections officials will necessarily exercise much case-by-case discretion in the administration of subsection (2). Over time, as evidence-based practices of in-prison rehabilitation improve, departments of corrections will be better positioned to allocate earned-time credits wisely.

There is arguably an additional policy basis for provisions like subsections (1) and (2). Some advocate the use of good-time and earned-time credits, the more the better, as a means of shortening prison sentences, reducing aggregate prison populations, and bringing down correctional costs. Indeed, historically, prison-population control has been one of the recurring functions of good-time laws. This objective, however, plays little role in the formulation of revised § 305.1. Looking to the larger institutional structure of the revised Code, correctional resource management is made a core function of the sentencing commission, and state sentencing commissions in the United States since 1980 have proven remarkably successful at discharging that responsibility; see § 6A.07 (Tentative Draft No. 1, 2007). Ceding a duplicative power to corrections officials, to be exercised as a matter of lightly regulated back-end discretion, would greatly complicate the sentencing commission's ability to do its job, and would unduly compromise the values of a determinate system.

b. Amount of credits available. The recommendation of a 15 percent good-time discount in subsection (1) is intended to be suggestive rather than directive, as signaled by the use of brackets. The available research and policy literature on good time as a correctional tool is sparse, and is inadequate to support conclusions as to best practices. A survey of American

determinate-sentencing systems reveals substantial variations in approach. The federal law and some states cap the available discount at 15 percent of a prison term, although a few states allow for as much as a 50 percent reduction, depending on offense type and criminal history. Primarily out of fears of unnecessarily investing sentencing discretion in corrections officials, the revised Code opts for a suggested formula at the low end of this range.

Subsection (1) recommends that credits be calculated against the full term of the judicially imposed prison sentence, and that this calculation be made at the outset of each prisoner's term. Different counting formulas are possible even after a percentage formula is established. For example, credits might be awarded at the end of each year, based on time served to date. This practice would result in a total discount measured against the denominator of time actually served by the prisoner rather than the larger denominator of the judicially pronounced sentence, which most prisoners will not serve in full. As a general matter, the revised Code takes the view that it is good policy to resolve doubts in the application of the good-time formula in favor of the prisoner. The primary evil in back-end provisions is the bestowal of power to *withhold* credits on improper grounds. A clear principle of lenity works to reduce this danger.

The Institute strongly recommends that good-time credits be available to prisoners regardless of whether they are confined in a prison or jail, and should be calculated to include any term of presentence detention credited to the prisoner under § 6.06A (slated for future drafting). Some states do not grant good-time credits against jail time, and this practice has survived constitutional challenge. This restrictive approach is disfavored by the Code on policy grounds, despite its constitutional permissibility. One assumption of § 305.1 is that good-time credits will be routinely awarded in the vast majority of cases. To preserve the values of a determinate system, and to best effect the judgment and expectations of the sentencing court concerning sentence severity, the allocation of credits should be as regularized as possible. Their availability should not depend on the happenstance of where an offender serves all or a portion of his sentence—or whether an offender has served part of his sentence while awaiting trial and sentencing on the current charge.

As for earned-time credits under subsection (2), no strict rule of automatic or presumptive awards is desirable. Given our present knowledge base about offender rehabilitation and prison management, there is no clear reason to favor any definite formula in model legislation. Much depends on the evidence of success of specific programs in reducing future criminal behavior, the improving knowledge of which prisoners are amenable to specific interventions, the observed results of varying incentive systems on program enrollment, and the exploration of methods to reach subjective judgments of what should count as "satisfactory" participation by individual inmates.

The alternative bracketed options in subsection (2) reflect the uncertainties above, as well as the fact that wide differences in the administration of earned-time credits exist across U.S. jurisdictions. Subsection (2) provides for either a percentage discount or fixed-time reduction as

a reward for program participation, and is agnostic about the precise amount of credit to be offered in either scenario. Care should be taken, however, that the earned-time provision does not distort the values of a determinate system. In adopting subsection (2), a state legislature potentially delegates a substantial measure of sentencing authority to its department of corrections. The Code's general concern over the possible inequities of back-end discretion militates in favor of a low ceiling on this authority, all the more so because the nature of earned time does not allow for routinization. Thus, for example, an enlightened legislature should be cautious in authorizing a percentage allowance above the 15 percent suggested in brackets in subsection (2), more so than if a similar increase were contemplated in the good-time calculation suggested in subsection (1).

An additional important concern within any system of earned-time credits is that in-prison programs are not equally available to all prisoners in all facilities. Good-quality rehabilitative interventions are in notoriously short supply, and tend to have long waiting lists where they exist. This creates many unavoidable inequities. Among them, only eligible prisoners who have access to a program slot can reap the benefits of § 305.1(2). Other equally deserving prisoners are excluded from the program's rehabilitative potential, and will suffer longer confinement terms even if they are eager to participate. These are serious difficulties, but they cannot be resolved within the four corners of the earned-time provision itself. The remedy can come only on a larger scale, through the development and funding of rehabilitative opportunities for all prisoners, which the revised Code identifies as a primary responsibility of the sentencing system; see § 1.02(2)(b)(vi) (Tentative Draft No. 1, 2007). In drafting subsection (2), it is perhaps defensible to assume that each state will provide adequate infrastructure for an equitable earned-time system. Still, in the real world, universal rehabilitative opportunities will not exist in any American prison system in the foreseeable future. Subsection (2) thus represents a further judgment: that the unfairness visited upon inmates unable to gain access to qualifying programs is outweighed by the societal benefits of maximizing participation in the programs that do exist.

c. Deductions from mandatory prison terms. The revised Code continues the Institute's longstanding policy of categorical opposition to the use of mandatory-minimum terms of incarceration; see § 6.06 and Comment *d*. Despite the Institute's disapproval, however, every U.S. jurisdiction has enacted numerous mandatory-minimum penalties. Where such penalties exist, the revised Code seeks to soften their effects. In the context of good-time and earned-time credits, questions sometimes arise concerning prisoners' eligibility when serving mandatory prison terms. In some legislation, eligibility is expressly withheld as part of the mandatory sentence. Subsection (3) resolves any doubts that might otherwise exist in favor of prisoners serving mandatory terms, while also expressing the more general policy view that mandatory sentences—if a legislature must create them—should be subject to reductions under § 305.1 along with other prison sentences.

d. Grounds for forfeiture of credits. Because prisons tend to have many rules, governing such things as personal hygiene and the times at which inmates must appear for meals, and

including detailed requirements of which prisoners are sometimes unaware, subsection (4) specifies that only a "serious violation" of institutional rules—or a new criminal offense—may support the removal of credits for good behavior. This is at base a matter of fairness and proportionality: For violations of disciplinary rules that are less than serious, prisons can employ lesser sanctions, or deprivations of privileges, that do not rise to a readjustment of the prison sentence itself. The limiting language in subsection (4) also helps ensure that the back-end discretion created in § 305.1 does not replicate the broad-based release discretion traditionally exercised by parole boards.

Section 305.1 does not address the procedural safeguards that should attend the granting, forfeiture, and restoration of good-time credits. These subjects were dealt with elsewhere in the 1962 Code, see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985), and remain subjects for future drafting in the Code revision project. Subsection (4) does, however, speak to the burden of factual proof for disciplinary allegations that may result in the forfeiture of good-time credits. Arguably, the evidentiary burden has as much effect on the workings of the forfeiture system as the black-letter definition of predicate acts. Today, many prison-discipline processes work with extremely low burdens. The minimum constitutionally required standard of review of good-time forfeiture decisions is that they be supported by "some evidence." Subsection (4) provides a higher floor, that the relevant facts must be established by at least a preponderance of the evidence.

e. Vesting. The Institute considered inclusion of a "vesting" provision in § 305.1, which would limit the power of corrections officials to remove good-time credits long after they were earned. For example, the following subsection might be added to the black-letter language above:

> **[Five] years after credits for good behavior are earned under this Section, the credits shall vest, and may not be lost or forfeited by the prisoner during the balance of a prison sentence.**

A vesting device along these lines would limit the possibility of vindictive removal of good-time credits that have accumulated over a period of many years, and would reinforce § 305.1's presumption that, for most prisoners, good-time credits will be reliably granted. However, no American jurisdiction in 2011 provided for the vesting of good time, and only a small number of states had ever done so. No scholarly literature analyzes the wisdom of such a proposal, or documents the supposed evil of vindictive action by corrections officials late in a prison term. The Institute concluded that too little information is available to support model legislation on the subject, but commends to states and researchers the project of studying more closely the merits of a vesting mechanism.

REPORTERS' NOTE [3]

a. Scope. Good-time and earned-time provisions are nearly universal in the United States, and are found in all determinate sentencing systems that make use of sentencing guidelines—the system type that is the institutional basis for the revised Code, see Model Penal Code: Sentencing, Report (2003), at 50-125. Beneath this apparent consensus, however, there is a bewildering diversity in approach across the states, with no easy route to the identification of best practices. See National Council of State Legislatures, Statutes Relating to Good Time/Earned Time (2009) (50-state survey); National Council of State Legislatures, Cutting Corrections Costs: Earned Time Policies for State Prisoners (2009); Nora V. Demleitner, Good Conduct Time: How Much and for Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777 (2009); Dora Schriro, Is Good Time a Good Idea?: A Practitioner's Perspective, 21 Fed. Sent. Rptr. 179 (2009).

James Jacobs has posited three categories of good-time credits: good conduct defined as compliance with institutional rules or the absence of disciplinary violations ("good time" in traditional parlance); meaningful participation in programs (often called "earned time"); and extraordinary service such as saving the life of a prison guard or helping to quell a riot (sometimes known as "meritorious good time"). James B. Jacobs, Sentencing by Prison Personnel: Good Time, 30 UCLA L. Rev. 217, 221 (1982). The first two categories are incorporated into § 305.1(1) and (2). The third is addressed elsewhere, in § 305.7 of the revised Code (this draft) (creating sentence-modification power responsive to "extraordinary" circumstances).

A fourth category has been suggested for *emergency* good-time credits, awarded to reduce prison populations in times of acute overcrowding. Ellen F. Chayet, Correctional "Good Time" as a Means of Early Release, 6 Crim. Justice Abstracts 521, 524 (1994); see also National Council of State Legislatures, Cutting Corrections Costs (2009). This function is not incorporated into § 305.1, partly because prison-population control is made a core responsibility of the sentencing commission under the revised Code, see § 6A.07 (Tentative Draft No. 1, 2007), and partly out of fears of investing too much discretion over incarceration terms in corrections officials, with concomitant dangers of abuse. See Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 267-269 (expressing doubts over the use of good time as a prison-population control device). In some instances, it may be politically attractive to meet a population crisis with a back-end solution of increased good-time allowances, on the theory that such provisions have low public visibility. If credit formulas are changed permanently as a response to a short-term crisis, however, this may not result in sound long-term policy. A better solution, if the good-time apparatus is to be turned to this purpose, is to authorize the temporary suspension of the normal rules for credit allowances. See Chayet, "Good Time" as a Means of Early Release, at 524 (13 state codes authorize "supplemental" good-time-credit awards under emergency crowding conditions).

The research literature on the use and benefits of good-time and earned-time provisions is exceedingly thin. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 522 ("Despite its use in prison systems throughout the world, credit-based release is a subject that has received limited research attention."). No one knows, even roughly, what the optimum credit allowances might be in different settings—or, indeed, whether the credit systems are at all successful in promoting prison discipline or offender rehabilitation. See Demleitner, Good

[3] This Reporters' Note has not been revised since § 305.1's approval in 2011. All Reporters' Notes will be updated for the Code's hardbound volumes.

Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 2009 at 783; Bert Useem et al., Sentencing Matters, But Does Good Time Matter More?), Institute for Social Research, University of New Mexico, Working Paper No. 14 (1996), at 4; Melissa Pacheco, Good Time and Programs for Prisoners (Nationwide), Institute for Social Research, University of New Mexico, Working Paper No. 3 (1996), at 6 ("The general assumption is that good time systems are necessary for the maintenance of order and discipline in the prison. However, there are no systematic data to support this belief. . . . There have been no studies that confirm that good time contributes to inmate reform."). The few substantial studies that exist are decades old. Two studies of good-time practices in the 1980s found that inmates released early had recidivism rates indistinguishable from control groups. James Austin, Using Early Release to Relieve Prison Crowding: A Dilemma in Public Policy, 32 Crime & Delinq. 404, 463-469 (1986); P.A. Malak, Early Release (Colorado Division of Criminal Justice, 1984). A third study in the 1980s found no strong evidence that inmates covered by Michigan's good-time policy were less likely to commit prison infractions than inmates not covered. James G. Emshoff & William S. Davidson, The Effect of "Good Time" Credit on Inmate Behavior, 14 Crim. Just. & Beh. 335, 343-344 (1987). A balanced summary of the thin research literature on good time is found in Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 534:

> It is not clear whether good time improves the in-prison behavior of inmates, but correctional administrators and staff believe that it assists them in maintaining institutional control. There is, however, no evidence that good-time credits have rehabilitative benefits, although in earned release programs, under certain conditions, credits may provide inmates with an incentive to engage in self-improvement. Finally, there is significant evidence to suggest that good time contributes to disparities in sentences served and correctional treatment inequities.

b. Amount of credits available. Because the Model Penal Code's sentencing system removes parole-release discretion in prison cases, the closest state analogues to § 305.1 are found in similarly determinate systems. Relevant provisions include: Ariz. Rev. Stat. § 41-1604.07(A), (C) (granting "one day for every six days served" for most prisoners, subject to forfeiture for rules violations or failure to participate in programming); Cal. Penal Code § 2933(b) ("For every six months of continuous incarceration, a prisoner shall be awarded credit reductions from his or her term of confinement of six months"; this is a general rule subject to exceptions based on crime type and criminal history); id. § 2933.05(a) (additional credits for program participation available, not to exceed 6 weeks during any 12-month period of confinement); § 2935 (possibility of additional 12-month reduction in sentence for heroism or extraordinary service to safety of institution); Del. Code Ann. tit. 11, § 4381(e) (up to 100 days of "good time" credit in a year for both good behavior and participation in programming; the ceiling for good behavior alone is 36 days per year); 730 Ill. Comp. Stat. 5/3-6-3(a)(2.1) (most prisoners eligible to receive "one day of good conduct credit for each day of his or her sentence of imprisonment"); Ind. Code § 35-50-6-3 (rate of accrual of credits depends on inmate classification; most generous formula is "one (1) day of credit time for each day the person is imprisoned for a crime or confined awaiting trial or sentencing"); id. § 35-50-6-3.3(i) (capping credit time at the lesser of 4 years or one-third of a person's "total applicable credit time"); Kan. Stat. § 21-4722(a)(2) (good time credits of 15 or 20 percent, depending on type and grade of offense); id. § 21-4722(e) (an additional credit of 60 days for program completion available to inmates convicted of less serious felonies); Me. Rev. Stat. Ann. tit. 17-A, § 1253(3) ("a person sentenced to imprisonment for more than 6 months is entitled to receive a deduction of 10 days each month for observing all rules of the department and institution"); § 1253(4), (5) (up to an additional 5

days per month may be deducted for inmates participating in various in-prison or community programs); Minn. Stat. § 244.101, subd. 1 (supervised-release term equal to 1/3 of the prison term normally results in release after 2/3 of the pronounced sentence); id. § 244.05, subd. 1b(b) (release can be delayed for disciplinary violation or refusal to participate in rehabilitative program); N.C. Gen. Stat. § 15A-1340.17(d),(e) (potential earned-time reductions vary by offense and criminal record, but do not exceed 45 percent); Ohio Rev. Code § 2967.193 (E)(3) (eligible prisoners may earn credits for participation in programs or periods they have remained in "minimum security status"; total credits not to exceed 1/3 their "minimum" or "definite" prison term); Or. Rev. Stat. § 421.120 (various rules and formulas for good-time and earned-time credits); id. § 421.121(2)(a) ("The maximum amount of time credits earned for appropriate institutional behavior, for participation in the adult basic skills development program . . . or for obtaining a diploma, certificate or degree . . . may not exceed 30 percent of the total term of incarceration"); Va. Code § 53.1-202.2 (establishing system of "sentence credits" "earned through adherence to rules, . . . program participation . . . and by meeting such other requirements as may be established by law or regulation"); id. § 53.1-202.3 (providing that no more than "four and one-half sentence credits may be earned for each thirty days served"); id. § 53.1-202.4 (State Board of Corrections to establish criteria for award of sentence credits and for their forfeiture); Wash. Rev. Code § 9.94A.729 (allowing "earned release time" for low-risk nonviolent offenders up to 50 percent of their term of sentence; for serious violent and sex offenders up to 10 percent; and for other offenders up to 33 percent). Many different good-time and earned-time formulas are found in indeterminate sentencing states, as well. For a recent statutory survey, see National Conference of State Legislatures, Statutes Related to Good Time/Earned Time (June 2009).

Subsection (1) provides that its credits shall be calculated against the "full terms of imprisonment as imposed by the sentencing court, including any portion of their sentence served in jail rather than prison, and any period of detention credited against sentence under § 6.06A." This language clarifies a number of possible ambiguities in the counting rules. See Barber v. Thomas, 130 S. Ct. 2499 (2010) (construing federal good-time statute to require the less generous of two alternative counting methods); McGinnis v. Royster, 410 U.S. 263 (1973) (upholding state practice of not awarding credits for jail time).

An earlier proposed version of § 305.1 capped the available credits for both good-time and earned-time at a total of 15 percent; see Discussion Draft No. 2 (2009), at 81. The current formulation was influenced by the recommendation of the ABA Commission on Effective Criminal Sanctions, Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable (2009) (Margaret Colgate Love, Reporter), at 28 (that revised § 305.1 should add to the credits available in subsection (2) "an additional 15% good time credit to be earned for participation in work and other rehabilitative activities . . . to give prison authorities tools to encourage participation in reentry programming"). See also Nora V. Demleitner, Good Conduct Time: How Much and for Whom?: The Unprincipled Approach of the Model Penal Code: Sentencing, 61 Fla. L. Rev. 777, 792-793, 796 (2009) (suggesting a total allowance in § 305.1 of one-third of a prison sentence, split between institutional compliance and program participation).

Some states reward inmates' participation in rehabilitative programming with a fixed credit upon program completion. For example, in 2009, the Colorado General Assembly authorized the Department of Corrections to award 60 days of credit toward release to prisoners serving prison sentences for nonviolent offenses who had successfully completed in-prison programs. This credit is available only once per prison term. The 120-day

allowance, bracketed in alternative subsection (2), is within the range of fixed credits currently authorized in state codes. See National Conference of State Legislatures, Cutting Corrections Costs: Earned Time Policies for State Prisoners (2009), at 2 ("The typical range for a one-time credit is between 30 days and 120 days.").

c. Deductions from mandatory prison terms. Most state good-time provisions do not speak to the question of whether credits are to be deducted from mandatory-minimum prison sentences, or do so on an offense-by-offense basis. The general rule stated in subsection (3) derives from the Institute's categorical disapproval of mandatory penalties rather than the weight of existing statutory examples. Nonetheless, subsection (3) finds precedent in at least one jurisdiction. See Iowa Code § 903A.5(1) ("Earned time accrued and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to [various provisions listed]"). Protracted litigation has occurred under some mandatory-penalty schemes when this issue is not resolved by statute. See Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. Davis L. Rev. 1025 (2004); In re Cervera, 16 P.3d 176, 178-180 (Cal. 2001).

d. Grounds for forfeiture of credits. Although there is little research on the actual behavior of prison disciplinary processes, practitioners and scholars in the field report that good-time credits are granted to most prisoners in the normal course, and that forfeiture is a relatively rare event. See Schriro, Is Good Time a Good Idea?, 21 Fed. Sent. Rptr. 179; Demleitner, Good Conduct Time: How Much and for Whom?, 61 Fla. L. Rev. 777; Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. 217. Assuming this is so, and also concluding it is a desirable state of affairs, subsection (4) reinforces the norm of routinely awarded credits by its recommendation that the substantive grounds of forfeiture should be narrowly defined.

Subsection (4) would also rule out certain questionable grounds for good-time forfeiture that exist in current American law. For instance, 13 states allow the revocation of good-time credits when a prisoner is found to have filed a frivolous lawsuit. In at least one state, forfeiture is authorized when an inmate demands DNA testing that ultimately confirms the inmate's guilt. See Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts 521; Tonja Jacobi and Gwendolyn Carroll, Acknowledging Guilt: Forcing Self-Identification in Post- Conviction DNA Testing, 102 Northwestern L. Rev. 263, 292 (2008); Fed. Bureau of Prisons, Legal Resource Guide to the Federal Bureau of Prisons 2008, at 14 (2008).

The subject of procedural safeguards in the prison disciplinary process is of considerable importance, but it is not taken up in this provision. The 1962 Code addressed questions of process later in Article 305, but offered few solid prescriptions; see Model Penal Code, Complete Statutory Text §§ 305.3, 305.4, and 305.5 (1985). These remain potential issues for later drafting in the Code revision project; see Discussion Draft No. 2 (2009), at 117-121 ("General Plan for Revision: Parts III and IV of the 1962 Model Penal Code").

Minimum due-process requirements for good-time forfeiture are mandated by federal constitutional law. See Wolff v. McDonnell, 418 U.S. 539 (1974); Superintendent, Massachusetts Correctional Institution, Walpole v. Hill, 472 U.S. 445 (1985). Nonetheless, in many prison systems, the ultimate fairness of the process has come under doubt. As James Jacobs reported in his classic study:

> Prison personnel preside over disciplinary hearings and such persons are subject to the pressures of institutional security, staff morale, and bureaucratic expediency. Despite the *Wolff* procedures, these hearings tend to be informal and perfunctory. "Not guilty" verdicts are extremely rare and, usually, the only doubtful issue is how severe the punishment will be.

Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 238 (1982); see also Chayet, Correctional "Good Time," 6 Crim. Justice Abstracts at 531-533 (collecting studies).

e. Vesting. A handful of American jurisdictions at one time provided for the vesting of good-time credits, although some also provided for "liens" against future earnings of good-time credits for bad behavior. All of the vesting statutes have since been repealed. See Jacobs, Sentencing by Prison Personnel, 30 UCLA L. Rev. at 239-240; Cal. Penal Code § 2931 (vesting provision not applicable to offenders whose crimes were committed on or after January 1, 1983); Minn. Stat. § 244.04 (cancelling vesting provision for offenders whose crimes were committed after August 1, 1993).