

June 2015

The Unsystematic Issuing Of Consecutive Sentences In America



A Report for the Ohio Criminal Justice Recodification Committee

 **CENTER FOR
PRISON REFORM**
The key to rehabilitation

The Center for Prison Reform
401 Ninth Street, NW, Suite 640
Washington, DC 20004
(202) 430-5545 office
(202) 888-0196 fax

Edwina Rogers
Chief Executive Officer
edwina@centerforprisonreform.org
(202) 674-7800 cell

Contents

- Overview and Recommendation..... 3
- Unintended Consequences..... 5
- US States 7
 - Arizona..... 7
 - Arkansas..... 7
 - California..... 7
 - Colorado..... 7
 - Delaware..... 8
 - Florida..... 8
 - Illinois..... 8
 - Maryland..... 8
 - Massachusetts..... 8
 - Michigan..... 9
 - Minnesota..... 9
 - North Carolina..... 9
 - Ohio..... 9
 - Pennsylvania..... 11
 - Tennessee..... 11
 - Virginia..... 11
 - Washington..... 12
- US Federal Government..... 13
- Foreign Countries 14
 - Australia..... 14
 - Canada..... 14
 - Israel..... 14
 - New Zealand..... 14
 - United Kingdom..... 14
 - Global..... 15

Overview

Charge stacking, or consecutive sentencing, happens when a judge orders a criminal with offenses committed in different scenarios to serve prison time one after the other instead of at the same time. In *Blockburger v. United States*, the Supreme Court said the government may separately try and punish the defendant for two crimes if each crime contains an element that the other does not¹.

Unfortunately, this has led the process of inventing ways to interpret one crime as several. In 2006, Khalid Bery was charged in California with 170 counts of misdemeanor because 170 of his goats accidentally wandered onto his neighbor's property, leading to 60 years in prison².

Courts have permitted 20 years imprisonment (two consecutive 10-year sentences) for passing bad checks and 30 years for wire fraud (six consecutive 5-year sentences), sentences which in other countries are reserved for violent crimes only³.

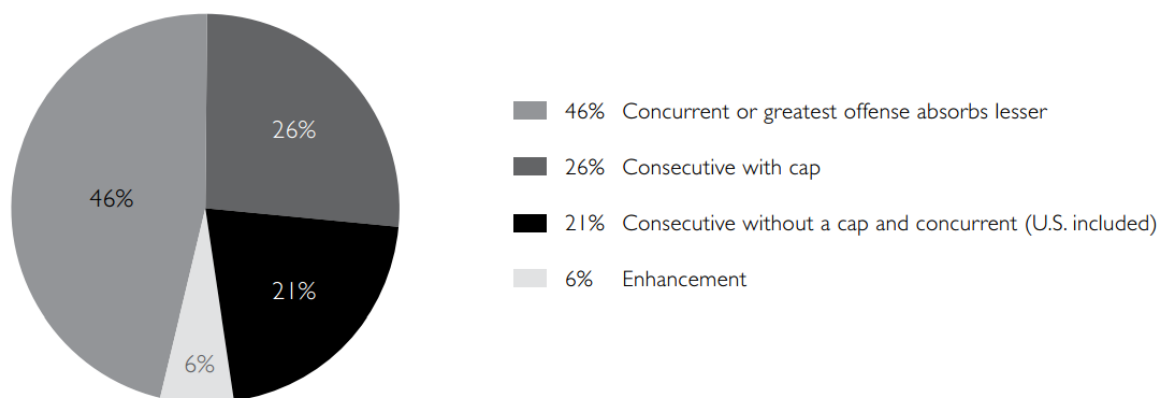
The U.S. is in a minority of countries (21%) that allow uncapped consecutive sentences for multiple crimes arising out of one act. Most use concurrent sentences (46%) and others (26%) allow consecutive sentences but cap them anywhere from 15 years to life⁴.

This report presents cases of serious injustice, shows that different US states and the federal US government are inconsistent in how stacking offenses are calculated, and then compares US practices to those of foreign governments around the world.

CONSECUTIVE SENTENCING

Countries by Type of Sentencing for Multiple Offenses Arising from Same Act

100% = 170 countries



¹ [Charge Stacking: Gambling with People's Lives](#), Seeking Justice for the Innocent

² [Khalid Bery: A Case of Discriminatory Prosecution by the Yolo County District Attorney](#), The People's Vanguard of Davis, January 2007.

³ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁴ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

In the United States, a non-violent offender can be sentenced to die behind bars. A person can get a 25-year-to-life sentence for stealing golf clubs if he has committed two previous offenses, or a life sentence if he has stolen small sums of money three times. A person can get a series of consecutive sentences for each of the component parts of his conduct, such as counting each child pornography file as a separate offense, resulting in a 150-year sentence, much longer than if that person had actually molested a child.⁵

These consecutive sentences are used frequently in the United States in ways they are not in the rest of the world. These American practices, focused on goals of deterrence and retribution, neglect the possibility of rehabilitation. Meanwhile, international human rights law places social rehabilitation and reformation as the aims of any penitentiary system. The International Covenant on Civil and Political Rights, a human rights treaty that the United States has signed and ratified, says, “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.” By ratifying this document, the United States has agreed that it will uphold this basic human right.⁶

The United States, Canada, and Micronesia are the only countries known to researchers that allow successive prosecution of the same defendant by both the federal and state government for the same crime. The sentencing practices in the United States exist at the same time that the United States has the largest prison population in the world and the highest incarceration rate in the world.⁷

Policy Recommendation

When examining the 50 states within the United States, along with the US Federal Government, and compared to 170 countries around the globe, Ohio falls within the 21% most-restrictive policies with regard to consecutive sentencing.

As we can see from the chart in the Overview, 21% of the world’s countries have consecutive, without a cap, and concurrent sentencing. A more viable model that would eliminate unintended consequences would be for Ohio to move in the direction where 26% of the world’s jurisdictions fall; i.e. allowing consecutive sentences but with a cap. The majority of the world’s jurisdictions, (46%) favor concurrent sentences or allow the greatest offense to absorb the lesser ones.

With regard to consecutive sentencing with caps, most jurisdictions have a cap of 2 or 3 offenses. Within the State of Ohio, it is highly recommended that a policy of consecutive sentences with caps be implemented, if not concurrent sentences with the greatest offense absorbing the lesser offenses.

⁵ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁶ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁷ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

Unintended Consequences

In a society where district attorneys are rewarded by how tough they can be on crime, stacked offenses seem like a good idea. The more crime that is committed, the more time is spent behind bars.

However, the system creates unintended consequences:

- There are diminishing returns to the value of sentencing a criminal to jail for longer times, for justice, for correction, and for rehabilitation.
- Two criminals who commit the same number of crimes may get different sentences because one of them was caught more often.
- The long jail times that result as a consequence of stacked offenses can create such a powerful threat that prosecutors can use them to coerce accused defendants into accepting plea bargains.
- Laws that require stacked offenses create a Soviet-style bureaucracy where power is taken away from judges to make discerning decisions on a case-by-case basis.

As a result, some newsworthy cases of injustice have embarrassed US states and counties, drawing attention to less notable but similarly unfair sentencing that is ubiquitous across the country. Just from May 2015, several news stories document this concern.

In Ohio, a 15-year old was sentenced to 112 years without parole in stacked sentencing for armed kidnapping, robbery and gang rape of a 22-year-old Youngstown State University student. A prior U.S. Supreme Court decision made it clear that a sentence for a juvenile like Moore must provide "meaningful opportunity for release," not to rule that such a juvenile "is never fit to re-enter society from the outset." Others argue those multiple sentences make Moore's sentence constitutional, even though they "may preclude the possibility of release during the juvenile offender's life."⁸

A 61-year-old man in Millsap, Texas was sentenced to 100 years of prison in a case of stacked DWI (Driving While Intoxicated) charges. The county district attorney said, "I am also pleased that the jury returned with very lengthy sentences and that Judge Towson stacked the sentences," seemingly happy with a life conviction for a non-violent offense.⁹

In Herrin, Illinois, a 16-year sentence was given to a man for two drug offenses. "Drug dealers should be sentenced severely to deter others," said the judge involved. The use of the word 'severely' is an acknowledgement of the unfairness of such a lengthy sentence. The judge wanting to make an example to society is contradictory to the fairness of the punishment fitting the crime.¹⁰

In liberal California, in May 2015, a man was given 19 years in prison for intent to sell cocaine and methamphetamine. Four prior drug convictions add three-years each to the original 7-year sentence. A

⁸ [Ohio Teen Serving 112-Year Sentence](#), Telegraph-Forum, February 4, 2015

⁹ [Millsap Man Receives Felony Conviction](#), Weatherford News, May 20, 2015

¹⁰ [Mississippi Court of Appeals Rejects Drug Appeal](#), The Hicksburg Post, May 22, 2015

nonviolent, mutually consenting transaction between adults, even if it is the sale of drugs, should not lead to a sentence that could have been given for murder.¹¹

The unnecessary severity of stacked offenses is demonstrated by how it is unevenly handled in different US states. As a country we are far from a consistent solution for how to handle such cases. A study of the diversity of approaches to stacked offenses illustrates this point.

¹¹ [Seaside Man Sentenced to 19 Years for Drug Dealing](#), The Californian, May 29, 2015

US States

Some US states allow, and others require, judges to issue consecutive sentences, and others require them to in certain circumstances, such as rape.

Alabama

Alabama's new sentencing guidelines for non-violent offenders relax consecutive sentencing¹² applied under the habitual offender act¹³.

Arizona

Arizona's criminal code sentencing provisions¹⁴ says that:

- Child molestation or sexual abuse sentences with one child may be concurrent, but any other offenses must be consecutive
- Unlawful mutilation sentences must be consecutive
- Sexual assault sentences must be consecutive
- Drug-related crimes may be stacked to a limit of 3 offenses

Arkansas

The Arkansas Supreme Court overturned a sentence of 5 consecutive life terms plus 80 years for a man who sold drugs three times¹⁵, and then continued two years later. The defense argued that the accused's drug sales in 2007 and 2009 should not have been considered as part of a continuing single scheme or plan, and the court agreed.

California

California's "three strikes" law, being a minimum sentencing law, is also a stacked offenses law, because it mandates that strike sentences for different counts be served consecutively¹⁶, eliminates probation, and requires offenders to serve time in prison, not a rehabilitation facility.¹⁷

California permits stacked offenses for DUI (Driving Under the Influence) up to four offenses^{18,19}. All previous offenses are considered even if they are not prosecuted at the same time.

Colorado

Colorado DUI offenses can be stacked up to a maximum of three times.^{20,21}

¹² [New Sentencing Guidelines to Impact Non-violent Offenders](#), Dothan Eagle, September 2013

¹³ [Alabama Code - Section 13A-5-9: HABITUAL FELONY OFFENDERS - ADDITIONAL PENALTIES](#)

¹⁴ [Arizona 2014-2015 Criminal Code Sentencing Provisions](#)

¹⁵ [Arkansas Supreme Court Overturns Walter Turner's Five Life Sentences in Drug Case](#), Magnolia Reporter, March 2011

¹⁶ California Penal Code 667(c) PC - Three strikes law-new version.

¹⁷ [California Three Strikes Law and Proposition 36 Reforms](#), Shouse California Law Group

¹⁸ [Multiple DUI Offense](#), The Law Office of Robert Taylor

¹⁹ [Orange County DUI Penalties](#), The Law Office of Barry T. Simons

Delaware

In 2014, Delaware lawmakers removed a provision forcing judges to impose consecutive sentences²². At the time it was the only state to require stacked sentencing. However, an amendment to the bill continues to require judges to impose consecutive sentences for murder, first-degree assault, carjacking, robbery, burglary, home invasion, and rape.

Florida

Florida allows up to three DUIs to be stacked²³.

Illinois

Severe bodily injury is required for mandatory consecutive sentences Illinois law²⁴.

Kansas

Kansas is one of only three states (along with Alaska and New Mexico) that always include the chance for parole no matter a crime's severity²⁵. Under Kansas law, the standard life sentence is "15 to life," meaning the offender gets his first parole hearing after 15 years, but this does not apply with consecutive sentencing. Judges have discretion to give consecutive sentences essentially to forestall any kind of probation.

Kentucky

In Kentucky, the maximum length authorized by KRS 532.080 for an enhanced Class C felony is twenty years, and consecutive sentences cannot exceed that amount, the state supreme court ruled²⁶.

Maryland

The Maryland sentencing guidelines manual shows that sexual offenses, rape, kidnapping, and robbery have consecutive sentences, not concurrent²⁷. (pg 37.)

Other types of crime such as 1st degree Assault are also stacked. (pg 64.)

Massachusetts

Massachusetts sentencing guidelines allow consecutive sentences²⁸ with the following limitation: "The total of consecutive sentences to the state prison may be combined up to twice the upper limit of the sentencing guidelines range in the grid cell of the governing offense. Where the total of the combined

²⁰ [DUI – 2nd Offense](#), Colorado Criminal Defense Lawyers

²¹ [Colorado DUI Penalties](#)

²² [Delaware Lawmakers Approve Consecutive Sentencing Reform](#), Delmarva Public Radio

²³ [DUI Types in Florida](#), Finebloom, Hanel, & Higgins

²⁴ [April Case List | Illinois Case Law Updates for April 2015](#), Illinois Case Law

²⁵ [Isn't One Life Sentence Enough?](#) Slate, August 2005.

²⁶ [Kentucky Supreme Court Awards Blackburn a Re-Sentencing Hearing. Says Punishment Too Harsh](#), The Levisa Lazer.

²⁷ [Maryland Sentencing Guidelines Manual](#), Version 7.1, February 2015

²⁸ [Massachusetts Sentencing Guidelines](#), Massachusetts Sentencing Commission, 1998

sentences exceeds twice the upper limit, it shall be considered a departure from the guidelines. The existence of multiple victims is recognized as an aggravating circumstance which may justify such a departure.”

The guidelines also say that for a consecutive sentence, the offenses may not arise from the same criminal conduct²⁹.

Michigan

In Michigan, consecutive sentences are not permitted from offenses out of the same acts³⁰.

Minnesota

DWI (Driving While Impaired) can be stacked up to 5 times in Minnesota³¹.

In Minnesota, consecutive sentencing is presumptive³² in the following situations:

- When an offender receives a custody status of supervised release, conditional release, escape, or confined; or
- The current offense is escape from an executed prison sentence
- The current offense is a DWI and there is a prior unexpired DWI for which the offender was on probation at the time of the current offense

Jail credit must be considered when deciding to give consecutive sentences³³. When serving consecutive sentences, and offender is only given jail credit towards one offense.

North Carolina

In North Carolina, defendants threatened with habitual felon status can be pressured to accept consecutive sentence plea agreements³⁴.

Consecutive sentences can only be applied when the offenses are distinct and “warrant separate punishment”. Shockingly the report says that “It was also frequently reported that judges impose consecutive sentences as leverage in cases where an inactive sentence is ordered, to encourage the defendant to comply with the conditions of probation.”

²⁹ [Sentencing Guidelines - 8. Nature of Sentence](#), Massachusetts Court System

³⁰ [COA Opinion: Michigan Law Does Not Permit Consecutive Sentencing for Prisoner Offenses Arising out of the Same Acts](#), Warner, Norcross, & Judd, October 2011

³¹ [What are the Mandatory Minimum Sentences for DWI Offenses in Minnesota?](#)

³² [Minnesota Sentencing Guidelines: Consecutive Sentences](#)

³³ *ibid*

³⁴ [Sentencing Practices Under North Carolina’s Structured Sentencing Laws](#), North Carolina Sentencing and Policy Advisory Commission, March 2002

Ohio

In Ohio there are several factors that determine whether sentences are served consecutively or concurrently.³⁵ The law in Ohio requires judges to find that consecutive sentences are necessary and not disproportionate to the crime and then make at least one of three findings before imposing consecutive sentences: 1) that the person was awaiting trial or sentencing or was on parole or in some other way under the court's thumb; 2) that the harm caused by the two offenses was so great that a single prison sentence is inadequate; or 3) that the person's criminal history is bad enough to demonstrate that consecutive sentences are necessary to protect the public.³⁶ The Ohio Supreme Court case *State v. Bonnell* states that "a trial court is not required to recite any 'magic' or 'talismanic' words when imposing consecutive sentences".³⁷

Ohio Revised Code Section 2929.41 Concurrent and consecutive sentences.

(A) Except as provided in division (B) of this section, division (C) of section 2929.14 [possessing firearms or body armor while committing a crime], or division (D) or (E) of section 2971.03 [life sentences for sexually violent predator specification] of the Revised Code, a prison term, jail term, or sentence of imprisonment shall be served concurrently with any other prison term, jail term, or sentence of imprisonment imposed by a court of this state, another state, or the United States. Except as provided in division (B)(3) of this section, a jail term or sentence of imprisonment for misdemeanor shall be served concurrently with a prison term or sentence of imprisonment for felony served in a state or federal correctional institution.

(B)

(1) A jail term or sentence of imprisonment for a misdemeanor shall be served consecutively to any other prison term, jail term, or sentence of imprisonment when the trial court specifies that it is to be served consecutively or when it is imposed for a misdemeanor violation of section 2907.322, 2921.34, or 2923.131 of the Revised Code.

When consecutive sentences are imposed for misdemeanor under this division, the term to be served is the aggregate of the consecutive terms imposed, except that the aggregate term to be served shall not exceed eighteen months.

(2) If a court of this state imposes a prison term upon the offender for the commission of a felony and a court of another state or the United States also has imposed a prison term upon the offender for the commission of a felony, the court of this state may order that the offender serve the prison term it imposes consecutively to any prison term imposed upon the offender by the court of another state or the United States.

³⁵ [Ohio Revised Code](#), LAWriter

³⁶ [Consecutive Sentencing Requirements](#), Matthew J. Bangarter

³⁷ [State v. Bonnell, 2014-Ohio-3177](#)

(3) A jail term or sentence of imprisonment imposed for a misdemeanor violation of section 4510.11, 4510.14, 4510.16, 4510.21, or 4511.19 of the Revised Code shall be served consecutively to a prison term that is imposed for a felony violation of section 2903.06, 2903.07, 2903.08, or 4511.19 of the Revised Code or a felony violation of section 2903.04 of the Revised Code involving the operation of a motor vehicle by the offender and that is served in a state correctional institution when the trial court specifies that it is to be served consecutively.

When consecutive jail terms or sentences of imprisonment and prison terms are imposed for one or more misdemeanors and one or more felonies under this division, the term to be served is the aggregate of the consecutive terms imposed, and the offender shall serve all terms imposed for a felony before serving any term imposed for a misdemeanor.

Amended by 129th General Assembly File No.131, SB 337, §1, eff. 9/28/2012.

Amended by 129th General Assembly File No.29, HB 86, §1, eff. 9/30/2011.

Effective Date: 01-01-2004

Pennsylvania

Driving under the influence (DUI) in Pennsylvania can be stacked three times³⁸.

Tennessee

In Tennessee, consecutive sentences may be ordered if one of the following conditions exist³⁹:

- The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- The defendant is an offender whose record of criminal activity is extensive;
- The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist...
- The defendant is a dangerous offender whose behavior indicates little or no regard for human life...
- The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor...
- The defendant is sentenced for an offense committed while on probation
- The defendant is sentenced for criminal contempt

These conditions are loose, giving judges too much leeway in ratcheting up sentences. However, trial courts are at least required to give their reasons for imposing consecutive sentences.

Virginia

In Virginia, DUI sentences can be stacked for up to four offenses⁴⁰.

³⁸ [Penalties for DUI in PA](#), Justin Ketchel Law

³⁹ [Tennessee Criminal Law: Consecutive or Concurrent Sentences?](#) Hollins, Raybin, Weissman, November 2010

⁴⁰ [Virginia DUI Penalties – Multiple Offenses](#)

Washington

In Washington, generally sentences for multiple offenses set at one sentencing hearing are served concurrently unless there are two or more separate serious violent offenses or weapon offenses⁴¹. Courts have the authority to impose consecutive sentences without an aggravating factor. Only a judge, not a jury, can impose exceptional consecutive sentences, and the reasons must be given. Law requires that each offense receive a separate sentence unless the offenses are ruled the same criminal conduct.

Consecutive sentences are triggered by:

- Revocation of probation
- Vehicular homicide while drunk or on drugs, or involving a child
- Firearm and deadly weapon offenses
- Sex offenses

⁴¹ [2013 Washington State Adult Sentencing Guidelines Manual](#)

US Federal Government

Federal laws require stacking of offenses for having a gun during a drug or violent crime (18 U.S.C. § 924(c)).⁴² The law is often applied to nonviolent gun owners, and to owners of legally purchased guns.

If a weapon was involved in a drug offense, prosecutors will press the defendant to plead by raising the specter of consecutive sentences under 18 U.S.C §924(c)⁴³. The first §924(c) conviction imposes a mandatory five-year sentence consecutive to the sentence imposed for the underlying drug crime; second and subsequent convictions each carry 25-year consecutive sentences, creating unjustly long sentences for drug defendants.

A report by the San Francisco School of Law⁴⁴ notes:

- A defendant who makes a single sale of narcotics can be handed three consecutive terms for violating three laws: sale of narcotics outside the original stamped package, sale of narcotics not pursuant to the appropriate Treasury order forms, and sale of narcotics known by the seller to have been illegally imported
- If a defendant deposits a check obtained by fraud, he can be found guilty of both the National Stolen Property Act as well as the mail fraud statute
- A person who robs a bank can be consecutively sentenced for both entering a bank with intent to commit robbery and for robbery

In 2013 a federal judge overturned consecutive sentences for a drug-related gun offense in Montana that added up to 85 years⁴⁵. The defendant simply had possessed a gun while selling medical marijuana, which was legal in Montana but not under federal law.

⁴² [What are the 924\(c\) Stacking Laws](#), Change 924(C).com

⁴³ [AN OFFER YOU CAN'T REFUSE: How US Federal Prosecutors Force Drug Defendants to Plead Guilty](#), Human Rights Watch, 2013

⁴⁴ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁴⁵ [Montana Medical Marijuana Grower Gets 5 Years in Federal Prison](#), Missoulian, February 2013

Foreign Countries

Australia

In Australia, multiple victims in different offenses usually require partly consecutive sentencing, especially in cases involving dangerous driving, sexual assault, assault and wounding, breaking and entering, and robbery⁴⁶. A Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.

Canada

Canada has implemented US-style law for repeat sex offenders. In cases with multiple victims, judges would be required to order that the mandatory minimum sentences be served one after another, including child pornography cases⁴⁷.

The law might be found to violate Canada's Criminal Code's "totality principle," which says an individual's overall sentence should not be overly harsh, or crushing, or they might violate the Canadian Constitution's ban on "cruel and unusual punishment."

Israel

The totality principle is also to be found in Israel⁴⁸ and consecutive sentences may be applied but only for actions in "numerous episodes". When consecutive sentences are ordered, the court must explain the reasons why.

New Zealand

New Zealand has virtually no statutory guidance on the application of consecutive or concurrent sentences, but concurrent sentences are intended for crimes in separate transactions. In New Zealand, the England and Wales Criminal Justice Act of 1991 set a limit of two sentences to be stacked⁴⁹. The totality principle is also used, which calls for assessment of proportionality between offences and punishments.

United Kingdom

Nonviolent drug dealers in the UK are subject to consecutive sentences⁵⁰, and consecutive sentences amounted to 12 months of jail time for stealing three razor blades for one woman⁵¹.

⁴⁶ [Concurrent and Consecutive Sentences](#), Judicial Commission of New South Wales

⁴⁷ [Push for Consecutive Mandatory Minimum Sentences May Run Afoul of Criminal Code](#), The Globe and Mail, March 2014.

⁴⁸ [Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012](#), Israel Law Review, October 2013.

⁴⁹ [Sentencing Multiple Offenders](#), Ministry of Justice

⁵⁰ [Medway Drug Dealers Charles Patrick and Ryan White Jailed for a Total of 11 Years at Maidstone Crown Court](#), Kent Online, May 2015.

Global

A complete list of countries and how they handle stacking offenses is available in a San Francisco School of Law report⁵². Only 21% of countries around the world, including the United States, allow uncapped consecutive sentences for multiple crimes arising out of the same act^{53,54}.

The ACLU wrote that consecutive sentencing statutes that result in excessively long periods of incarceration have led to over-incarceration in the United States, failing to uphold rehabilitation as the goal of incarceration⁵⁵.

⁵¹ [Droitwich Grandmother Admits Stealing to Buy Drugs](#), Worcester News, May 2015

⁵² [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁵³ [Cruel and Unusual: U.S. Sentencing Practices in a Global Context](#), University of San Francisco School of Law, May 2012

⁵⁴ [Extreme Criminal Sentences: Violations of International Standards](#), Human Rights Advocates, February 2013.

⁵⁵ [Solitary Confinement, Extreme Sentencing, and the Death Penalty](#), ACLU