

Paying the Price: Nebraska gun law helped spark nation-leading prison growth

Henry J. Cordes

Jan 9, 2022
Nebraska's prison inmate population is growing faster than anywhere else in the nation, way out of sync with nearly every other state.

And the smoking gun behind much of that growth — and the millions of dollars that those extra inmates are costing Nebraska taxpayers — is a 2009 state law that created new gun crimes and toughened penalties. The law also helped steer hundreds of offenders from federal prisons into the state system, adding to the tab for Nebraska taxpayers.

As Gov. Pete Ricketts and the Legislature debate whether a new \$230 million prison is needed to deal with the state's chronically overcrowded and understaffed corrections system, The World-Herald has uncovered a significant untold story behind the prison crisis.

No state grew its prison population more in the last decade than Nebraska. Its inmate count increased 16% between 2010 and 2020 even as such numbers nationally fell by nearly a fourth, according to a World-Herald analysis of U.S. Justice Department data. In fact, Nebraska and Idaho are the only states whose prisoner numbers didn't decline over the decade.

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So at a time when many states across the country are closing prisons, Nebraska is staring at the possibility of building a pricey new one to deal with what has recently become the nation's most overcrowded prison system.

Why is Nebraska trending so out of step with the nation?

Nebraska gun law helped spark nation-leading prison growth

Amid a complex web of reasons, the World-Herald analysis indicates the tougher penalties for gun crimes passed by the Legislature in 2009 have been a major driver.

Enacted in response to an epidemic of gang violence in Omaha's inner city, the law significantly ratcheted up penalties for assaults and gun crimes, including a number of new mandatory minimum sentences. And it did so at a time many other states were beginning to rethink stiff criminal penalties.

Now offenders facing longer gun and assault sentences are stacking up in Nebraska's prisons. In hindsight, that result seems obvious and predictable. But it wasn't fully appreciated at the time — or even since.

Between 2008 and 2020, Nebraska corrections records show that the number of inmates whose most serious offense was a gun crime skyrocketed from 85 to 777 — an increase of more than 800%.

Those incarcerated for assault jumped from 539 to 730. The increase of inmates in those two categories alone account for the majority of the inmate growth in that time.

While few would dispute that those who commit crimes involving violence and guns deserve serious prison time, some question whether lengthening sentences and stacking charges under the 2009 law was necessary to tackle the problem.

“Is that really success?” said Mark Foxall, a former Omaha and Douglas County law enforcement official who now teaches at the University of Nebraska at Omaha. “Are you doing anything to prevent them from carrying a gun in the first place?”

The state's increased gun crime incarceration came as fewer Nebraska gun crime cases were prosecuted federally after passage of the new law.

It's unclear how much the Nebraska law — which sought to make the state's gun laws more closely mirror federal ones — contributed to that decline. A UNO criminologist at the time predicted it would lead to a shift of cases from federal to state courts.

Regardless of the reasons, it's clear hundreds of gun offenders who previously would have done their time in federal prisons over the past decade have instead helped fill Nebraska's badly overcrowded system.

Douglas County Attorney Don Kleine, who backed the law and whose office prosecutes many gang and gun cases, defended the law as a necessary response to a serious problem.

“We said we were going to go after people who were illegally using guns and committing violent crimes, and it shows we've done that,” he said.

Gun offenders are indeed paying the price under the law, but the state is, too, in the form of both overloaded prisons and huge costs to taxpayers.

The annual average cost of housing an inmate is more than \$40,000 per year. If Nebraska had simply kept its prison population flat over the past decade, the state could have spent tens of millions of dollars less.

It's little wonder that in the past decade, only two states on a percentage basis have increased spending on corrections more than Nebraska. The state's \$250 million corrections budget is up 60% over the past decade, well outpacing the 39% rate for the rest of state spending.



Guards and prisoners at the Tecumseh State Prison in 2015. The annual average cost of housing an inmate is more than \$40,000 per year.

RYAN SODERLIN, THE WORLD-HERALD

Prison spending is set to take an additional leap in coming years under sizable pay increases for corrections workers that are aimed at addressing longtime staffing shortages. And that doesn't take into account the cost of new facilities.

To be sure, it's not just offenders sentenced under the 2009 gun law who are filling up Nebraska's prisons. Numerous other factors contribute to Nebraska's nation-leading incarceration growth.

— The number of Nebraska inmates whose most serious crime is a drug offense was up 21% between 2008 and 2020, despite widespread belief that such offenders should be diverted from expensive prison beds. Nebraska has a higher percentage of prisoners locked up for nonviolent offenses than most states.

— One in three Nebraska prisoners is back behind bars within three years. Nebraska needs more programming within prisons to help inmates change their lives, and also could do more to support them when they return to the community. Prison staff shortages in recent years have limited prisoners' ability to receive such programming.

— Parole remains elusive for many offenders. The median time an offender spends in prison in Nebraska before being paroled increased 60% between 2011 and 2020.

The Legislature now has a historic opportunity to chart a new course on corrections.

A working group that includes law enforcement officials, judges, lawmakers and others has been studying the challenges facing Nebraska's prisons. With help from the nonprofit Crime and Justice Institute, it has put together a report that could spur possible action by the 2022 Legislature.

To help lay the foundation for that debate, The World-Herald plans an occasional series this year on Nebraska's prison crisis — what's driving it and what can be done to relieve it.

The series begins today with the revelation of Nebraska's nation-leading incarceration spike, and how past actions by state lawmakers have played a direct hand in that growth.

In many ways, the 2009 law was just part of a long-term pattern.

State lawmakers over the years have frequently been willing to stiffen criminal penalties, while at the same time showing no appetite for paying for the expensive prison space needed to properly house new inmates, said Bob Houston, former director of the Nebraska Department of Corrections.

“It makes no logical sense,” said Houston, now a UNO criminal justice professor. “But it makes political sense.”

The kinds of gang-related shootings that sparked the gun crackdown in 2009 continue — including the death last month of a 14-year-old Omaha girl. Overall, however, trends for homicides and shootings in Omaha have been down in recent years.

But other factors make unclear what role, if any, the 2009 law played in those reductions.

Since then, Omaha police have worked closely with community leaders to overhaul their strategy for tackling gun violence, with positive effect.

Thanks to a beefed-up gang unit, greatly enhanced Crime Stoppers rewards and shot-detection technology that speeds police response, those who commit such crimes are far more likely today to be caught. **Research has consistently shown** the certainty of being arrested is a vastly more powerful deterrent than punishment.

Some justice advocates say the state would be better off putting the millions spent annually locking up offenders longer into treatment and services that will help them succeed when they are released into society. After all, according to one report, 95% are expected to get out one day.

The state and community also could address the chronic poverty, broken households, generational offending and lack of school success that push kids into gangs and breed crime.

“Rather than continue to invest more and more on penalty-driven systems, let’s invest more in our youth and families,” said Willie Barney, a North Omaha activist who has helped lead community efforts to combat gang violence. “There would be an incredible return on investment, and drastic improvement in our communities, if we allocate more funds to prevention and rehabilitation.”

With roughly 50% more prisoners than they were designed to hold, Nebraska prisons have now surpassed Alabama's to become the nation's most overcrowded, the World-Herald analysis of federal prison data found.

The analysis also found no state is seeing its prison population grow quite like Nebraska's.

Nebraska at 16% and fast-growing Idaho at 10% are the only states that posted prison population increases between year-end 2010 and year-end 2020 — the latest for which state-by-state data is available. Every other state with valid data showed a decline. Almost half of the states went down more than 20%.

Due to the pandemic, Nebraska and all other states but one saw prison populations drop between 2019 and 2020. The pandemic closed courts and slowed the movement of cases through the justice system.

But most states had broader inmate declines that long preceded the arrival of COVID-19. Nationally, incarcerations were already down 11% in the decade prior to the pandemic. They've now fallen for 11 straight years.

In fact, Nebraska and Idaho are the only states that finished 2019 — just before the start of the pandemic — with new all-time-high prison populations. All others saw their inmate populations peak in prior years. Iowa and more than a third of the states peaked a decade or more ago.

Experts have cited generally declining crime rates and efforts to reform criminal justice systems as the main drivers of those national numbers.

The United States by percentage still locks up more of its people than any other country in the world. Nebraska historically has had an incarceration rate significantly below the U.S. rate, and it remains lower today.

But in the past decade-plus, that gap has narrowed significantly. Based on pre-pandemic trends, Nebraska's rate was on pace to top the U.S. rate within a decade. A consultant previously projected Nebraska's prison population, now about 5,500, will top 7,300 by 2030.

For years, Nebraska's lower incarceration rate has given the state a financial advantage, allowing it to spend its money on things like education or social services rather than prisons, said Hank Robinson, a former UNO criminal justice professor.

“But it’s losing that benefit it used to enjoy,” Robinson said.

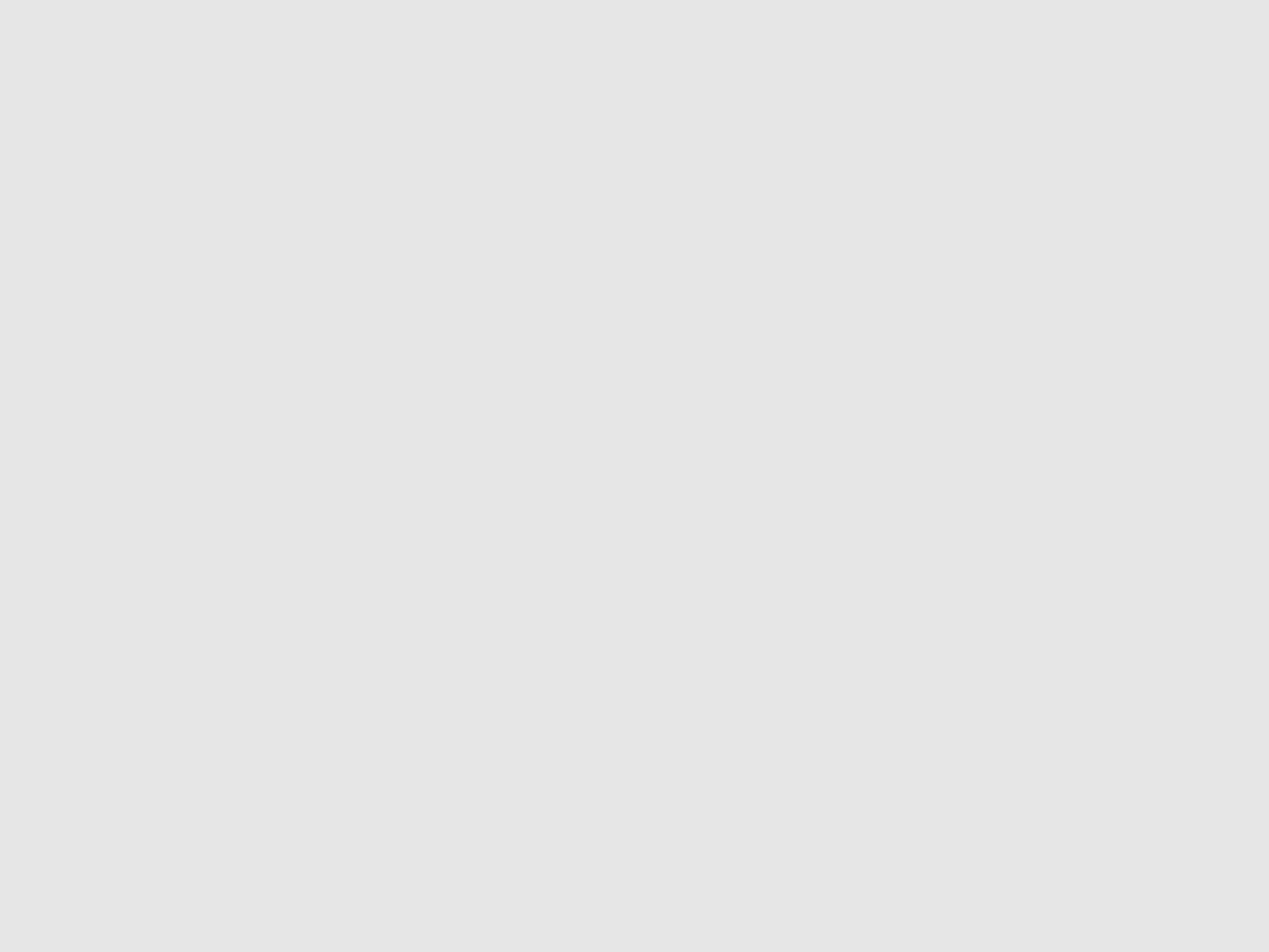
A number of state officials and other observers in Nebraska were stunned by the numbers behind Nebraska's nation-leading prison growth. After The World-Herald uncovered the state's sharp spike in gun offenders being locked up, one of the biggest reasons for that growth became apparent.

"Those weapons numbers are startling," said Len Engel of the Crime and Justice Institute, commenting before the nonprofit began working with Nebraska on its possible criminal justice reforms.

But Robinson already knew what had been driving those numbers. Because he saw it all from two perspectives — during the legislative process, and from inside Nebraska's prisons.

In 2007 and 2008, rival gangs were at war on Omaha's streets. One shooting incident would frequently spark a series of retaliatory shootings.

During the 31 days of July 2007, there were 31 shootings in the city. During a 15-day period in September 2008, there were 19 shootings, including six resulting in death.



An epidemic of shootings, like this one being investigated by Omaha police in 2008, helped prompt the Legislature to pass the new gun law in 2009.

REBECCA S. GRATZ, THE WORLD-HERALD

"When there were serious gang battles going on, I remember every night getting a phone call at home of a shooting or homicide," Kleine said.

With homicides in Omaha reaching levels not seen in decades, State Sen. Brad Ashford of Omaha sought to do something about it.

The centerpiece of his 2009 gun violence bill was a proposed new State Office of Violence Prevention. It would fund intervention programs like CeaseFire, a celebrated, often emulated program in Chicago in which former offenders worked to talk kids out of gang life.

But Ashford's bill also included provisions creating mandatory minimum penalties for gun crimes.

At the same time, then-Attorney General Jon Bruning proposed an anti-gang crime bill of his own that went all-in on enhanced penalties for gun crime.

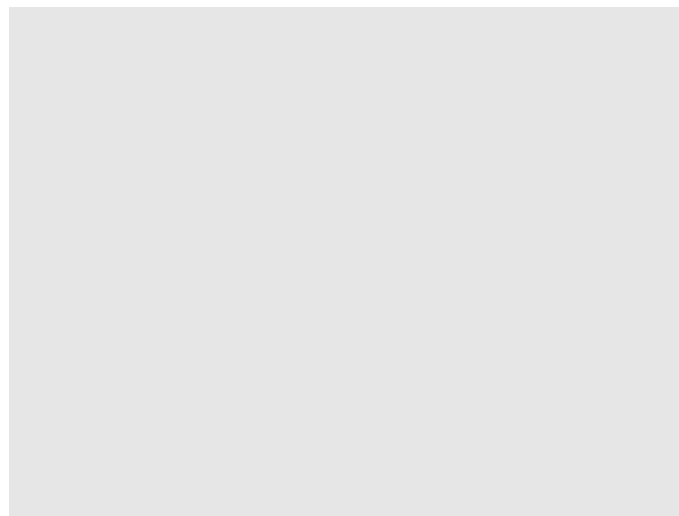
Ashford and Bruning soon joined forces. Ashford and Sen. Mike Friend of Omaha, who had introduced Bruning's bill, agreed to marry the two proposals, creating what Ashford called a "carrot and stick" approach to gangs and gun violence.

The "stick" included a five-year mandatory minimum sentence for using a gun during a crime, and a three-year mandatory sentence for being a felon in possession of a firearm. The felon in possession law was also broadened to include other prohibited persons, including domestic violence offenders.

The bill also mandated a three-year minimum term for shooting at an occupied structure, and created a new crime of drive-by shooting carrying a five-year mandatory minimum.

The measure created a new crime of possessing, but not using, a gun during the commission of a felony. The federal government had long had such a possession law, but not Nebraska.

Backers of the bill said they wanted to make Nebraska's laws and penalties on criminal gun possession more aligned with those on the federal level. In the case of felons in possession, the Nebraska penalties became more severe.



Nebraska Attorney General Jon Bruning and State Sen. Brad Ashford in 2009 each came in with their own ideas for dealing with gangs and gun violence. Ashford's prevention-focused bill was eventually married with Bruning's, whose focus was raising penalties for gun crimes.

PHIL JOHNSON, THE WORLD-HERALD

The bill also more than doubled the maximum penalty for first- and second-degree assault, and it made some graffiti offenses felonies, too.

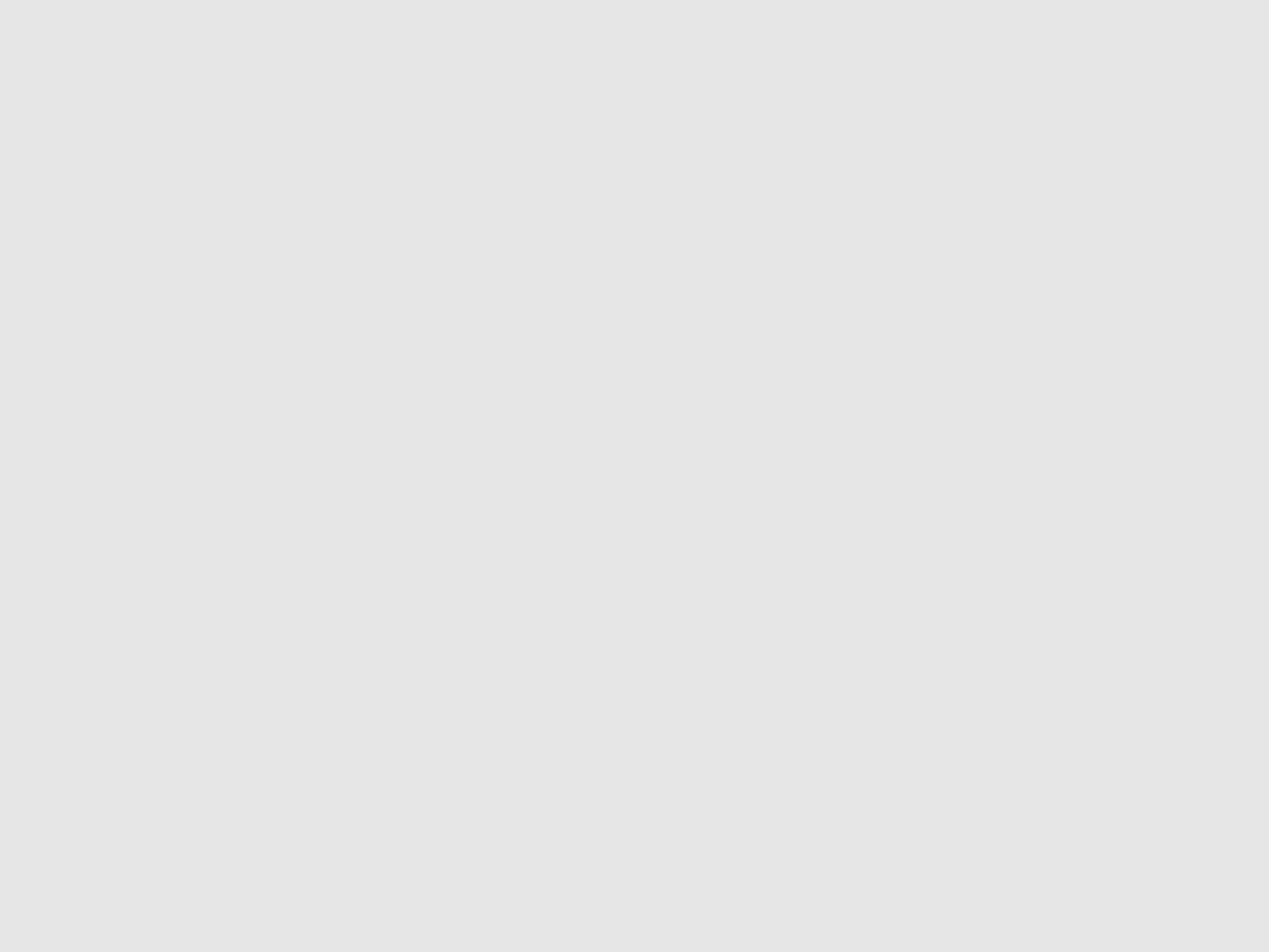
“Without the ‘stick’ approach, you’re not going to get anywhere with these kids,” Ashford said at the time of Legislative Bill 63. “It’s a tool to get people to understand the gravity of what they’re doing.”

While such statements are politically popular, they run counter to what criminal justice experts say.

The National Institute of Justice says studies have consistently shown that increasing the severity of punishment is not an effective deterrent to crime, in part because criminals know little about the sanctions for specific crimes and aren’t thinking about such things before they offend.

LB 63 carried huge budget implications for the state. But you wouldn’t know that by looking at fiscal projections at the time.

The total cost to the state budget was officially estimated at just over \$500,000, all just to fund the "carrot" in the bill: Ashford’s violence prevention office. Due to the difficulty of projecting such impacts into the future, the Legislature and corrections officials offered no estimate of what increased incarcerations under the bill would cost the state.



Debate on the Safe Haven law at a special session on the floor of the Nebraska Unicameral Legislature. Senator Brad Ashford of Omaha watches the debate.

JAMES R. BURNETT, THE WORLD-HERALD

One of the few voices speaking out publicly against the plan was Robinson, who at the time was director of the juvenile justice institute at UNO and who had been studying gangs.

Testifying in the public hearing, Robinson questioned whether the increased penalties were necessary. He estimated they would cost between \$15 million and \$20 million a year.

And his estimates didn't include the cost to Nebraska of housing inmates in state prison who previously would have been sentenced under federal gun crimes laws. Robinson anticipated such a shift, with offenders merely trading a federal cell for a

state one.

"Constituents demand a response to thuggery and gun violence making headlines around the state, but not at any cost," Robinson said then.

If lawmakers wanted to deter potential shooters, he said, the best way was to give police more resources so offenders would know there's a high likelihood they will be caught.

State Sen. Ernie Chambers, a consistent and fierce opponent of proposals in Nebraska to lengthen prison sentences, had just left the Legislature due to term limits, not to return for another four years.

Ben Gray, a former Omaha city councilman who has worked to stop gun violence in Omaha's Black community, went to Lincoln to testify in favor of Ashford's violence prevention program.

But he says today he never would have offered that support had he known it would be tied to the harsher criminal sanctions. He wonders whether some state lawmakers were similarly blind to all that was in the bill.

"That's a draconian bill," he said recently.

On the floor, the measure sailed to final passage on a 43-4 vote.

The bill was so relatively non-controversial that one of the senators voting for it — despite stated reservations about costs and penalties — was Danielle Conrad. Today, she's the leader of ACLU of Nebraska, which for years has sounded the alarm on Nebraska's overcrowded prisons and called for reforms.

One criminal who soon became subject to the new gun laws was an 18-year-old gang member named David Castillas. He would serve as an early example of how the new law functioned.

Targeting a rival he believed was seeing his girlfriend, Castillas in June 2010 twice wielded a rifle and shot up occupied Omaha homes during drive-by shootings. One bullet struck a woman in the arm.

Castillas was lucky he didn't kill someone. And under any circumstances, he was likely to face serious prison time for his crimes.

But with the new gun laws on the books, Douglas County prosecutors proceeded to throw the book at him.

He was convicted not only of second-degree assault, but also two drive-by counts and three tack-on charges of using a deadly weapon during a felony. Each of the latter five charges carried new five-year mandatory minimum sentences.

Whether such mandatories were necessary to appropriately punish Castillas is subject to debate.

Under previous state laws, even taking into account time off for good behavior, the judge had the discretion to sentence him to up to 25 years for using a firearm to commit a felony. And shooting at an occupied dwelling previously carried a maximum potential 10-year term. The judge arguably would have had the tools to send him away for as long as he felt was necessary.

But under the new law, with the conviction on the five mandatories, the judge was bound to imprison Castillas for a minimum of 25 years.

The judge apparently felt that was enough, as he tried to set that as the low end of the teen's sentence. But the judge erred and accidentally added another 2½ years to the minimum.

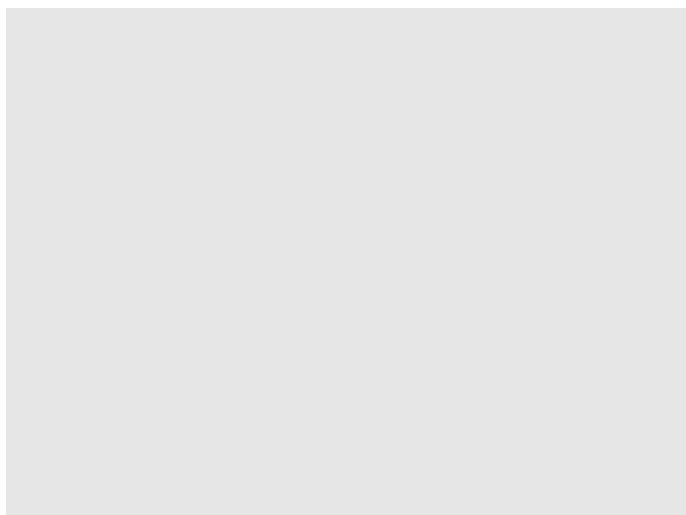
In the end, Castillas will serve 27½ years before he is eligible for parole, and without parole would serve 52½ years before completing his sentence. Arrested as an 18-year-old, Castillas would by then be 70 years old.

Kleine, whose office prosecuted the case, defends the sentence as what state law prescribed.

"The bottom line here is people shouldn't shoot into houses that are occupied trying to kill people," he said.

The sentence was upheld by the Nebraska Supreme Court in 2013 in one of the first legal tests of sentences under the new law.

The court also made clear those sentenced under such mandatory minimum laws don't start earning any time off the back end of their sentence for good behavior until they complete the minimum — contrary to corrections department practice at the time.



Nation-leading inmate growth over the past decade has helped make Nebraska state prisons like Tecumseh, shown here, the most overcrowded in the country.

MATT DIXON, THE WORLD-HERALD

While the Castillas case may be an extreme example, a look at who is increasingly filling Nebraska's prison beds offers much evidence of the 2009 law's impact.

Before the law change, about 50 offenders per year entered prison in Nebraska whose most serious offense was a gun charge.

Within a few years, the number was up to 100 a year. And then 200 a year.

Then 250. At first, they came mostly

from urban counties, but over time they have come from all over the state.

Part of that increase related to increased gun crimes arrests, which rose 28% between 2010 and 2019. But sentences were a driver.

Between 2011 and 2018, the annual percentage of Nebraska inmates admitted with mandatory minimum sentences also quadrupled from 4% to 16% — an increase likely strongly tied to new minimums in LB 63.

While it's impossible to determine how long offenders actually would have been sentenced to prison under the old laws, typically increased legal penalties and mandatory minimums do tend to mean more time behind bars. Mandatory minimums give judges less discretion, must be served consecutively, and keep offenders from earning time off of their sentence.

Another indicator of the law's impact: Total incarceration has grown in the past decade even though the number of new admissions has been falling. Offenders are simply staying longer.

“If the sentences get longer, it has a compounding effect, as the offenders stack up on top of each other,” Robinson said.

Robinson had a first-hand look at the new law’s impact on the prison population. For two years beginning in 2012, he worked as an administrator for the state corrections department.

At the time lawmakers passed LB 63, the state’s prison system was already among the nation’s most overcrowded — 41% over design capacity. The inmate population had been flat for several years, but once the law took effect, it soon began to shoot up — 27% over the next 10 years.

 A Flourish chart

Robinson and other prison officials would at times suggest to local prosecutors and other law enforcement officials that they try to take gun cases through the federal system, given the impact of the new law on prisoner numbers.

But it didn't make much difference. The numbers just kept going up.

Before the pandemic hit, the Nebraska system topped out at nearly 60% over capacity.

Brad Ashford today admits that his 2009 anti-violence bill turned out to be a lot more stick than carrot.

The violence prevention office, while today still handing out grant dollars for local programs aimed at stemming violence, has never really lived up to its promise. And he now believes the escalation of penalties went too far and was wrong, putting Nebraska out of step with national criminal justice trends and reforms.

“I think it was a wasted opportunity,” Ashford said recently. “And we’re paying a price.”

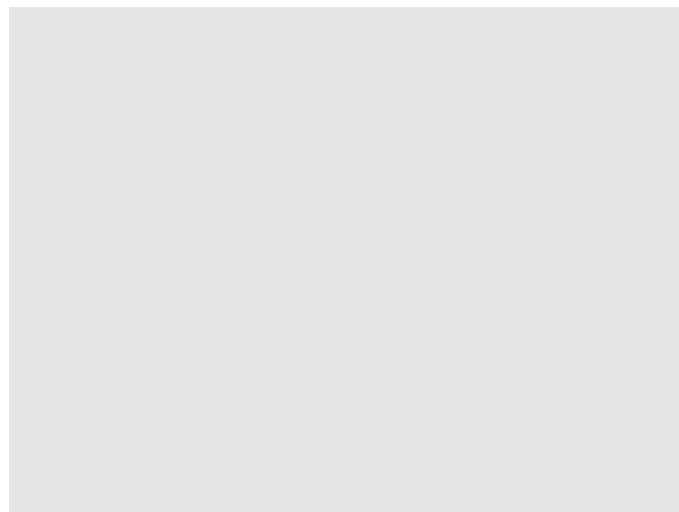
Friend, the other LB 63 sponsor who went on to serve as the first director of the new violence prevention office, defended the law. One of the prime obligations of public officials is protecting the public, he said.

But Friend also said it’s always appropriate to look at how a law is working.

“I don’t think LB 63 was a mistake, but time can give you a decent perspective on how a piece of legislation built by humans functions,” he said. “Maybe we can go back and look at those penalties. But we had an opportunity to handle this issue from every angle, and we did that.”

The Nebraska ACLU says the law clearly isn't working as intended and should be fixed as part of "smart justice reform."

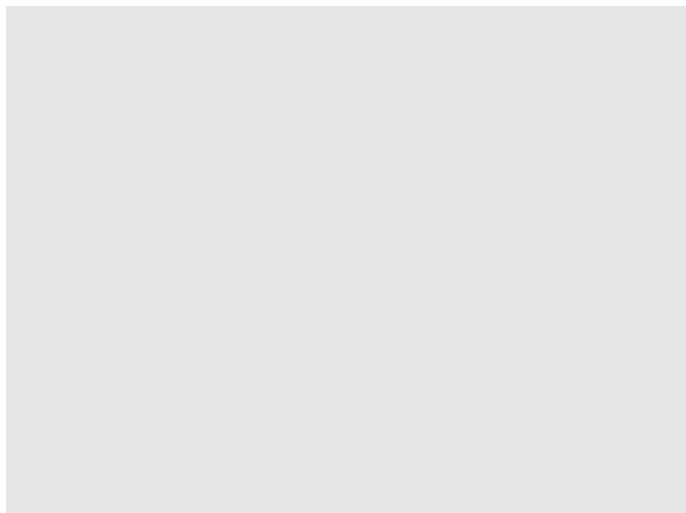
Nicole Porter of the Sentencing Project, which has worked to overhaul sentencing policies across the country, said she’s not at all surprised to see Nebraska’s prison growth under such a law.



Senator Brad Ashford reads the Omaha World-Herald while waiting for then-Gov. Dave Heineman to give a State of the State address.

JAMES R. BURNETT, THE WORLD-HERALD

She said Nebraska followed a playbook many states had used before, lengthening sentences and creating multiple crimes that can be charged in relation to the same offense, allowing prosecutors to pile penalties on top of penalties. She said prosecutors also use multiple charges and charges carrying mandatory sentences to try to force defendants into plea deals.



Nation-leading inmate growth over the past decade has helped make Nebraska state prisons like Tecumseh, shown here, the most overcrowded in the country.

Nebraska Department of Corrections

“Overlapping criminal codes that empower prosecutors to stack charges that result in decades behind bars is the root of the mass incarceration problem in the United States,” Porter said.

She said many states have been rethinking such policies. Indeed, one of the ironies of the Nebraska gun crimes law is that it passed just as many states were beginning to embark on criminal justice overhauls meant to reduce incarceration.

Beginning with Texas in 2007, at least 35 states have launched efforts to curb prison growth and save money, according to Pew Charitable Trusts research.

Louisiana, which for years has had the nation’s highest incarceration rate, enacted changes in 2011 that have helped reduce its prison population 33%.

Alabama, which had the nation's most overcrowded prison system before recently being overtaken by Nebraska, has reduced its inmate count more than 20% since 2012.

Utah, which at one point like Nebraska was looking at the possibility of building a new prison, has seen a 23% inmate decline since 2013.

Actually, Nebraska is among the states that have attempted a similar overhaul. After a previous task force study, the state passed a bill in 2015 that it was hoped would reduce Nebraska's prison population by as much as 20%.

But that measure failed to make its anticipated dent, and it's possible LB 63 played a role in that.

New prison admissions for nonviolent crimes like theft, burglary and fraud are down sharply since the reform efforts. But the increased numbers of gun offenders appear to have helped offset those changes.

During the 2015 Nebraska reform effort, lawmakers proved reluctant to touch any of the state's mandatory minimum sentences. At least eight states since 2007 have adjusted mandatory minimums, according to Pew.

 A Flourish chart

Overall, national polls show the public is divided on whether they believe the United States overuses incarceration. A recent Pew poll found 28% of Americans believe people convicted of crimes spend too much time in prison, 32% don't feel they spend enough, and 37% say they spend the right amount.

While such polling tends to split on partisan lines, it's not just a partisan issue. The federal government under Republican President Donald Trump in 2018 passed a law seeking to roll back unnecessarily long federal sentences. And numerous states led by Republicans have passed reforms.

Now Nebraska is again looking to enact changes that could take it off its current course of higher incarceration, overcrowding and bigger spending on prisons.

Sen. Steve Lathrop of Omaha was in the Legislature in 2009 and voted for the gun bill. He was also one of the leaders of the recent state prison working group.

He said he supported the 2009 law as reflecting the prevailing "tough on crime" political views of the time. But he said it's fair now to question whether longer sentences are the best investment for protecting public safety.

"I don't think it has resulted in the public safety we wanted," he said.

He said he will be looking to find a more balanced approach, including "thoughtful changes" to sentences that "don't throw prison doors open," more focus on rehabilitation of offenders while they are incarcerated, and services to help offenders succeed once released.

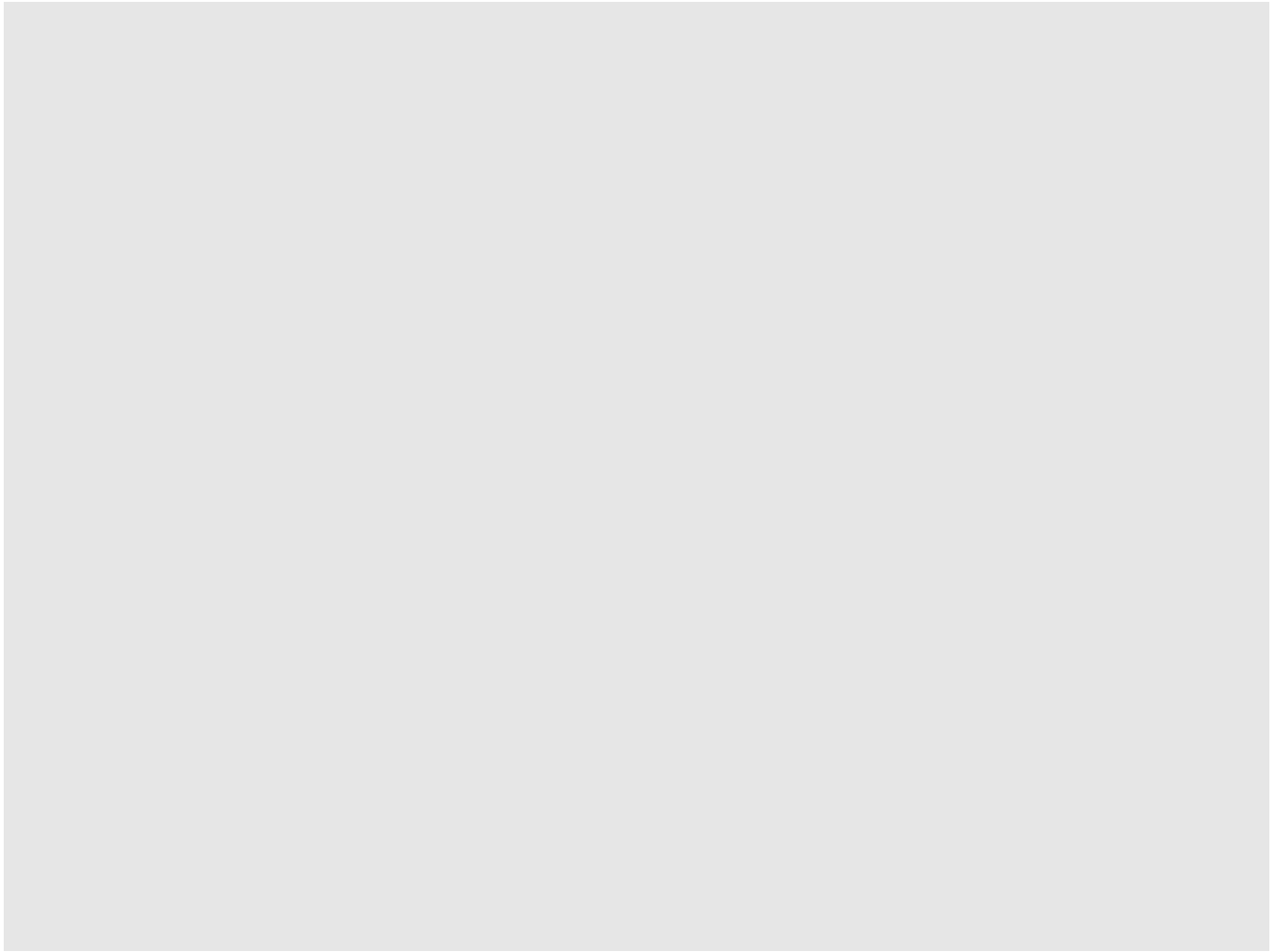
Ashford believes the state needs both to reconsider criminal penalties and improve prisoners' reentry into society.

"It's not acceptable anymore, for political reasons, or any reason, to simply address a problem by putting people in prison for long periods of time," Ashford said.

"If we are going to keep these sentences on the books and not enhance reentry options, then, yes, we will have to build another prison. And we will fill it."

Nebraska's 10 state prisons from least to most crowded

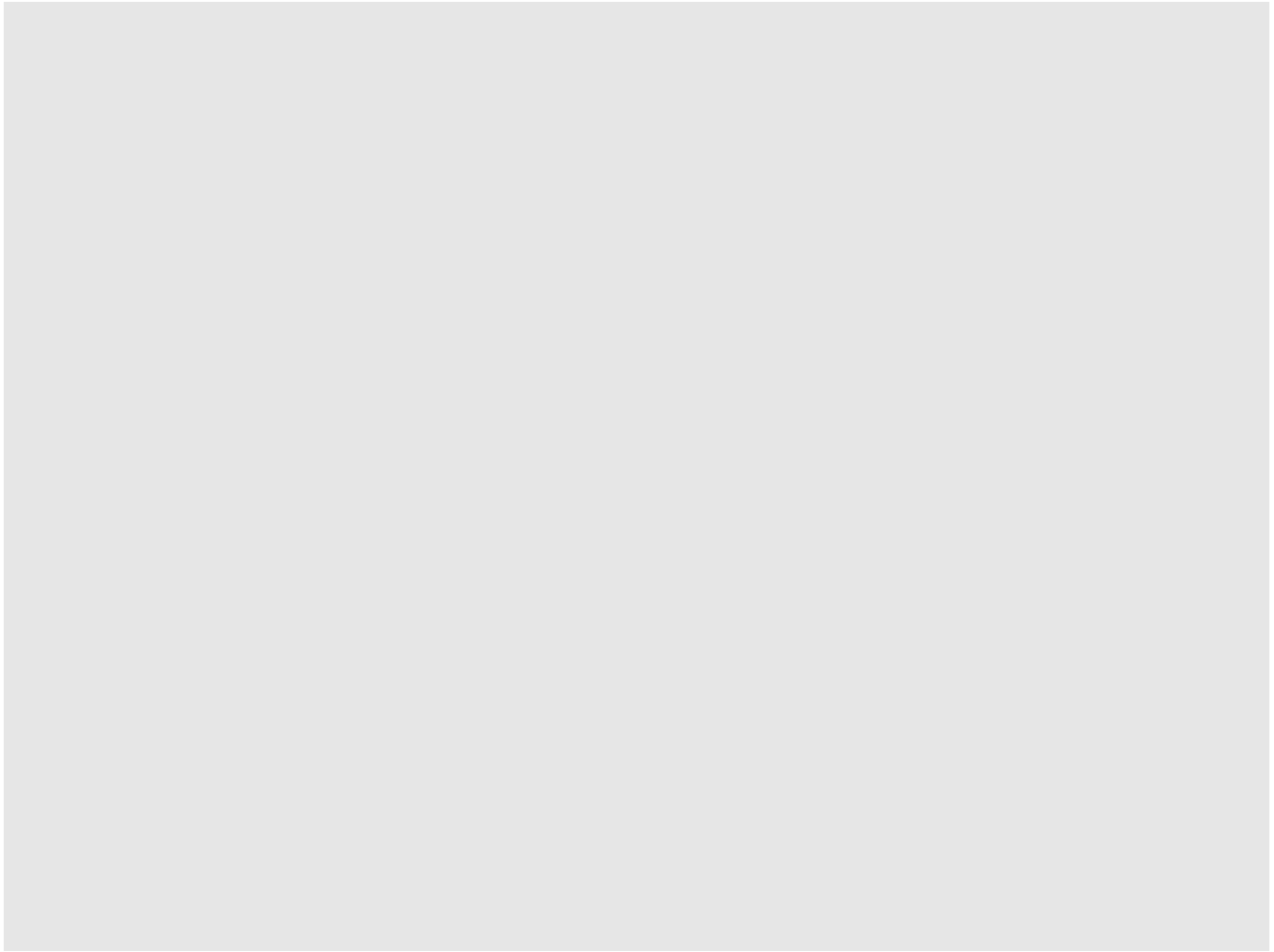
10. Nebraska Correctional Youth Facility



82.6% of design capacity

KILEY CRUSE, THE WORLD-HERALD

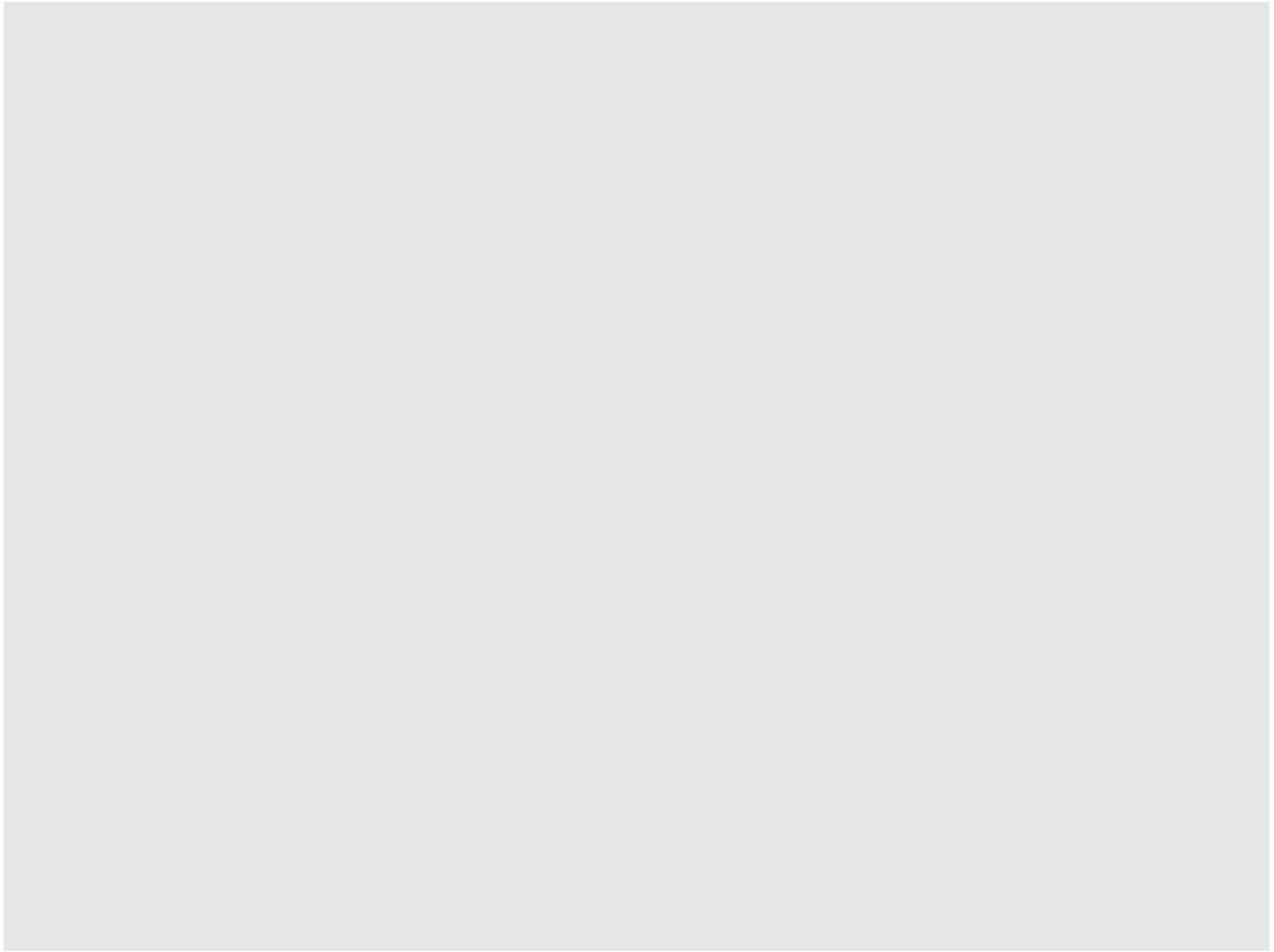
9. Nebraska Correctional Center for Women



98% of design capacity

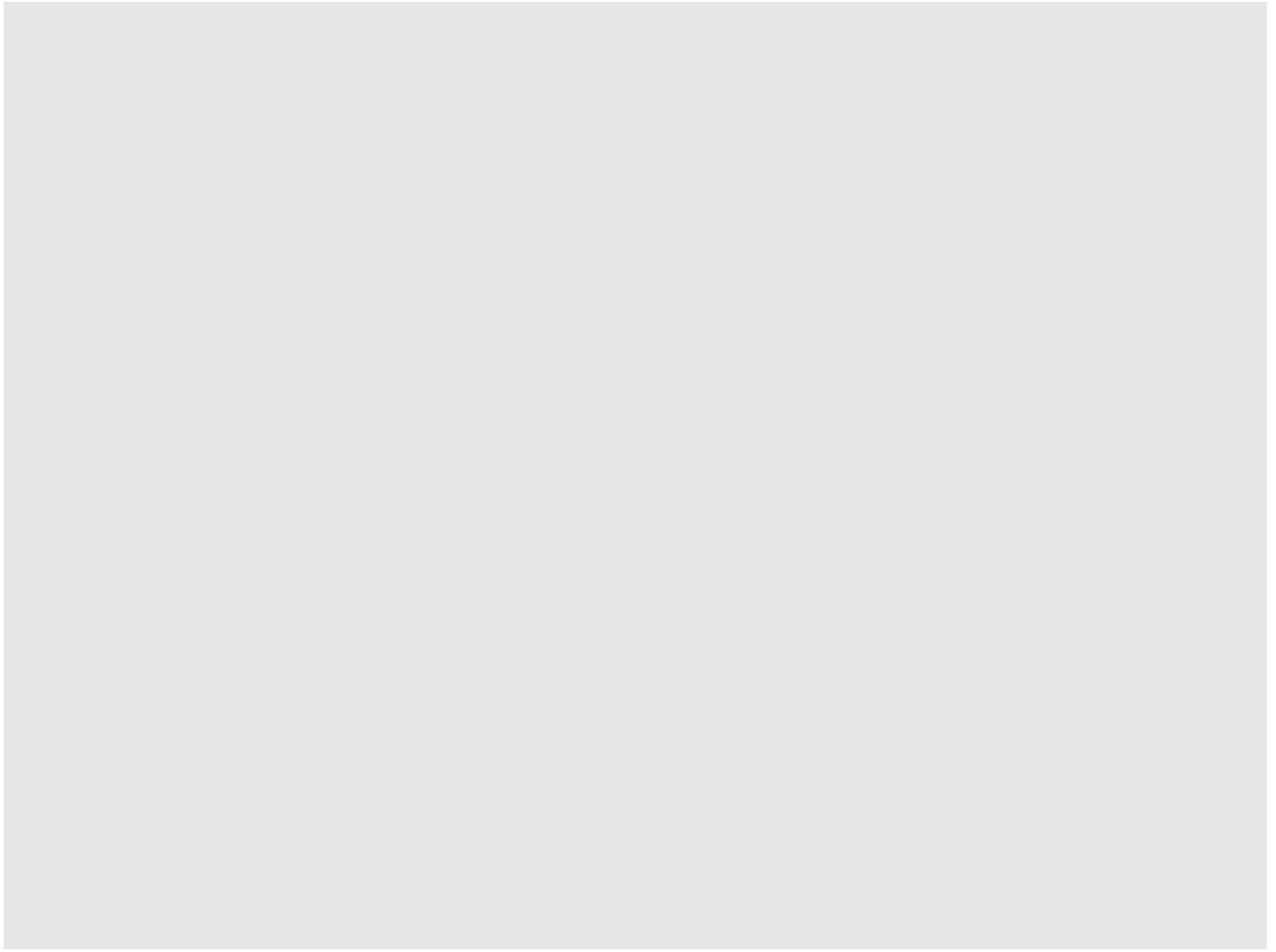
THE WORLD-HERALD

8. Tecumseh State Correctional Institution



107.3% of design capacity

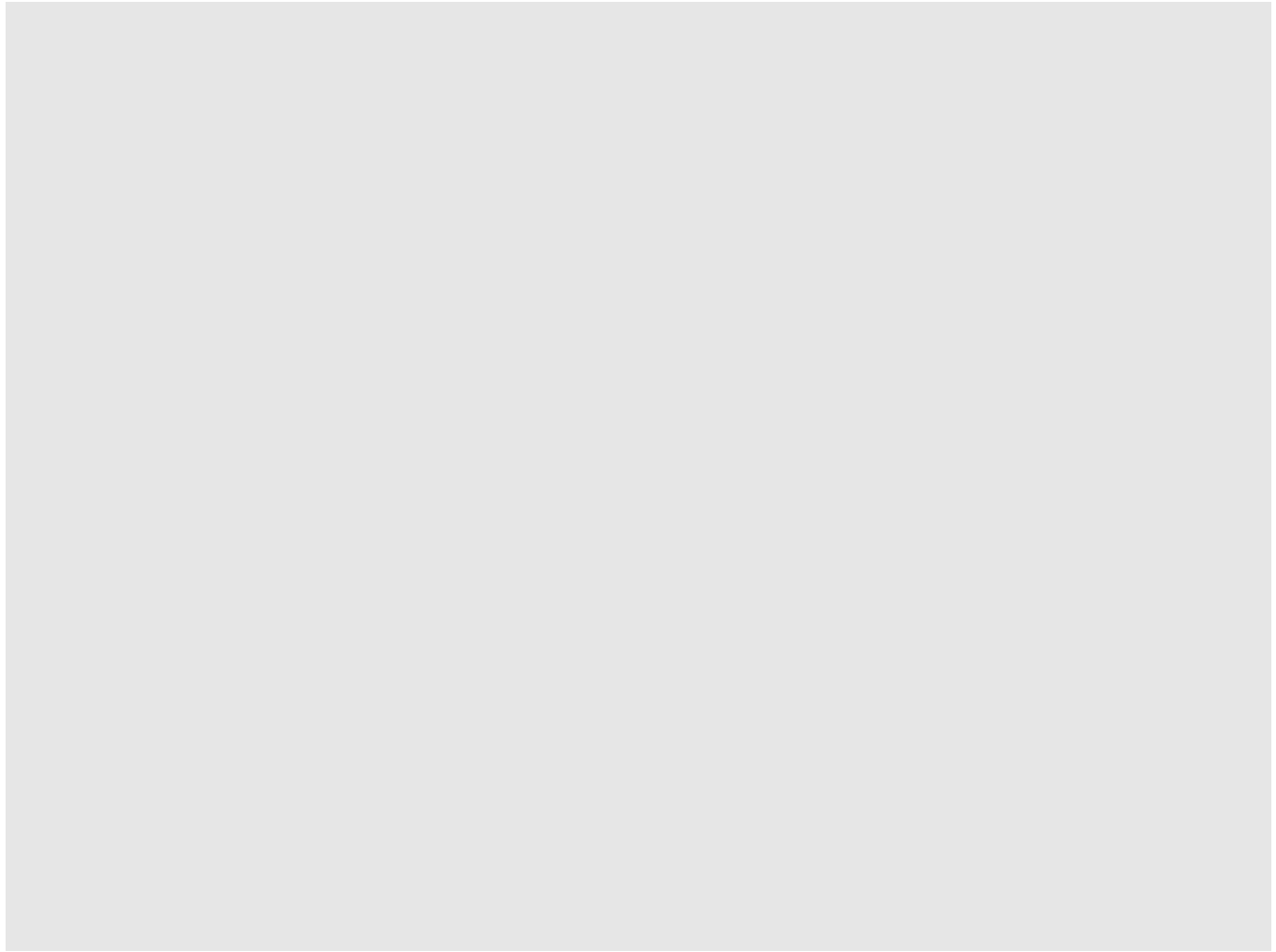
7. Community Corrections Center-Lincoln



132.4% of design capacity

REBECCA S. GRATZ, THE WORLD-HERALD

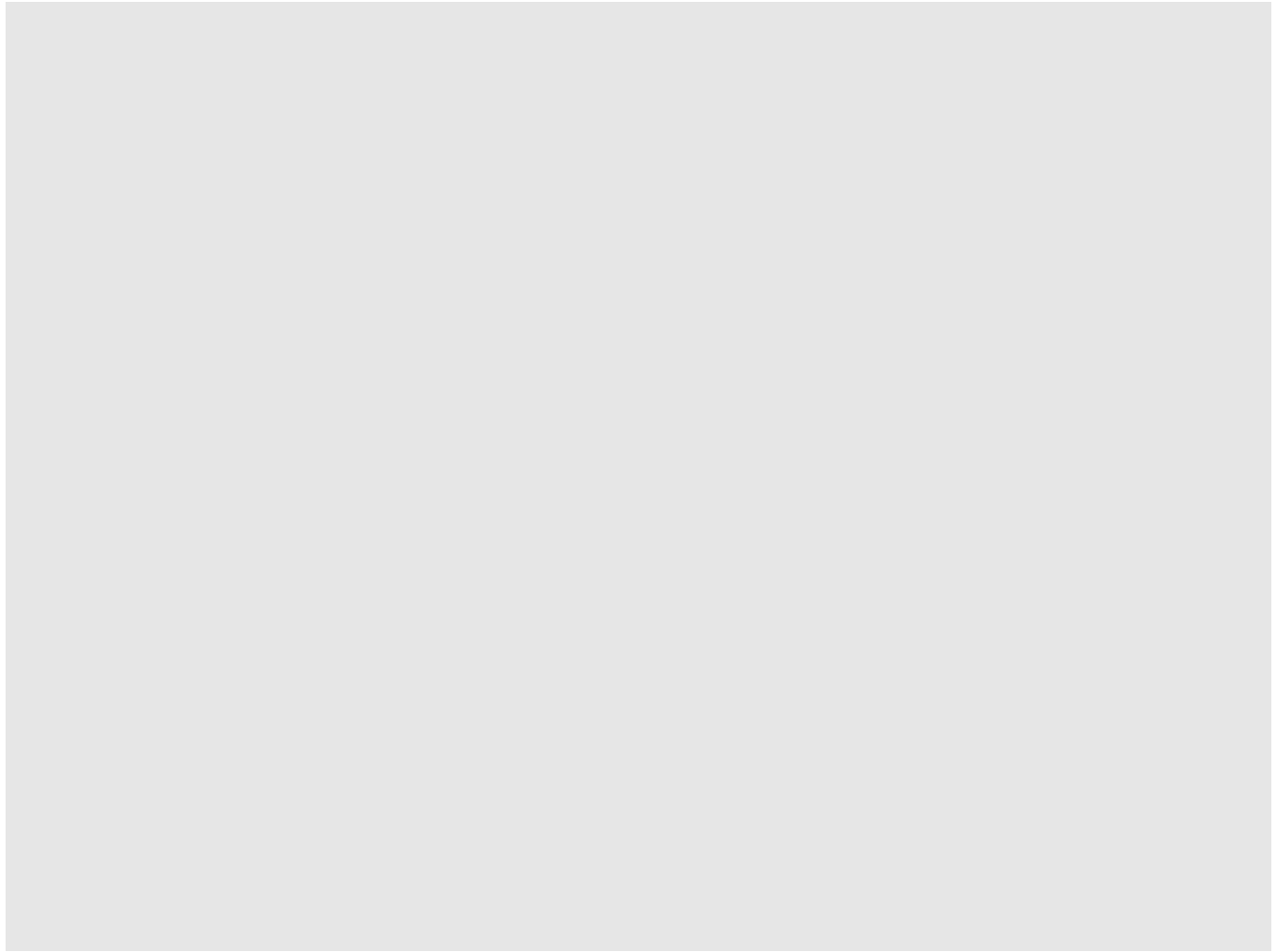
6. Nebraska State Penitentiary



157.5% of design capacity

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

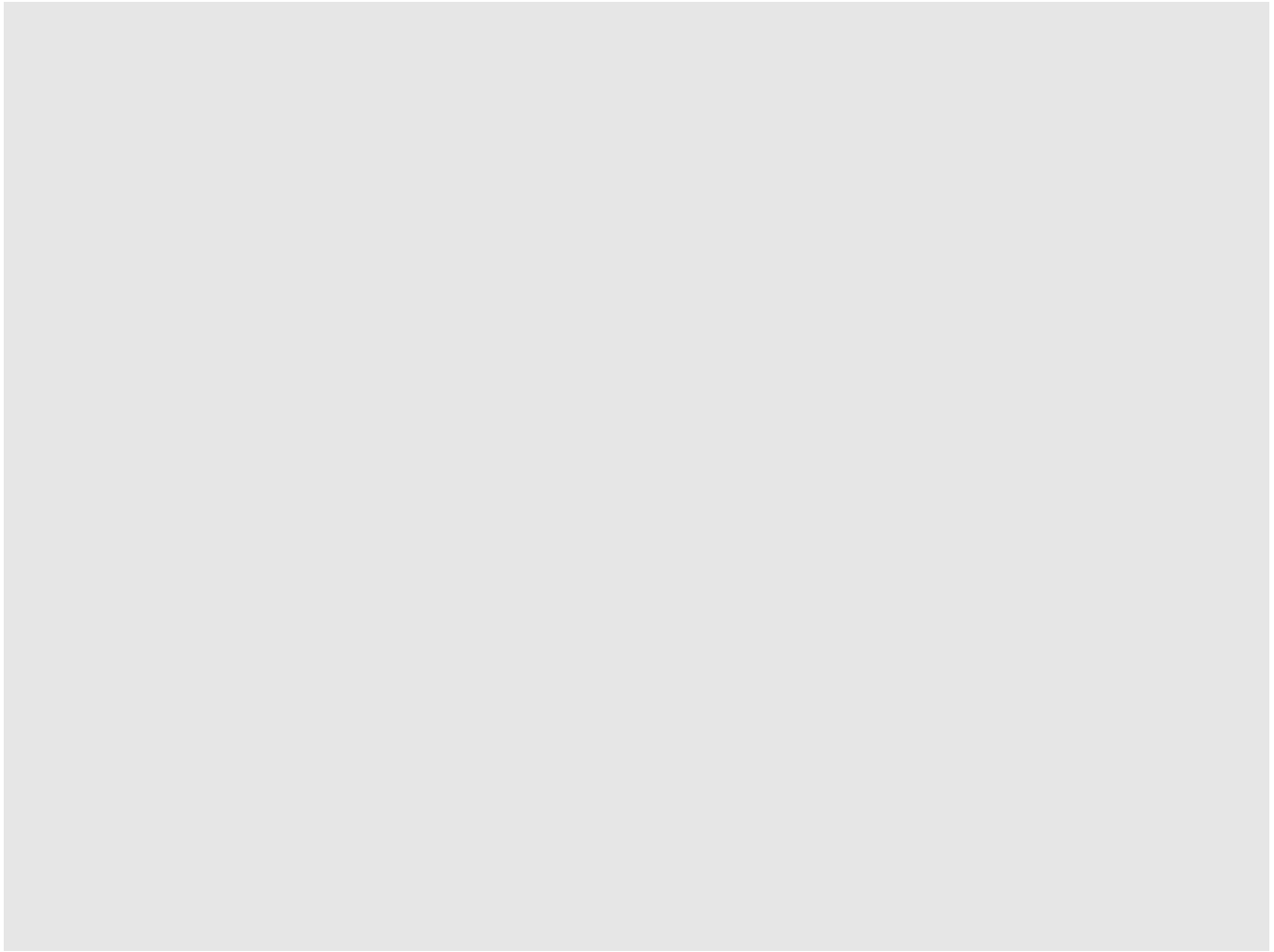
5. Lincoln Correctional Center



168.2% of design capacity

THE LINCOLN JOURNAL STAR

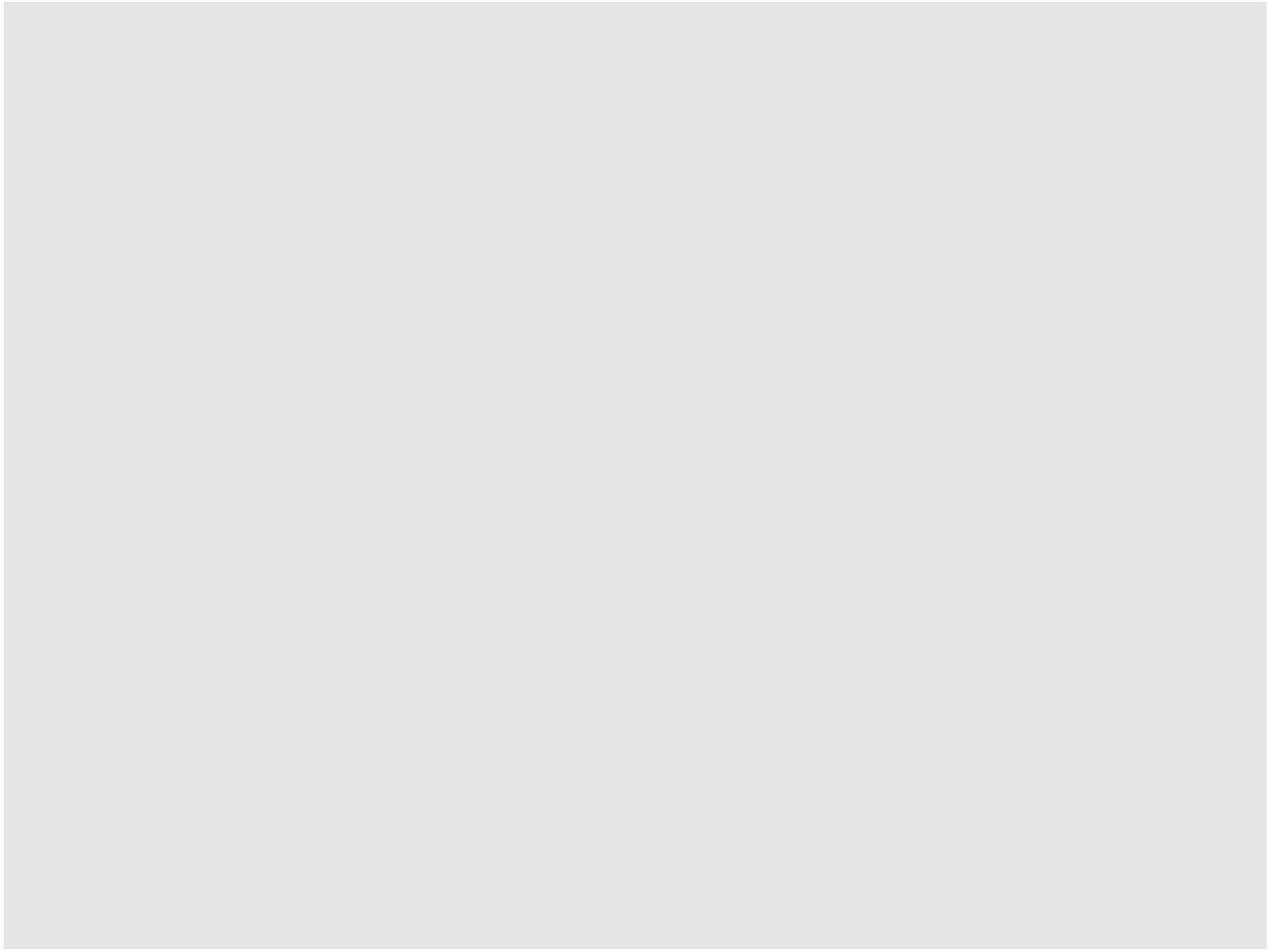
4. Work Ethic Camp



186.1% of design capacity

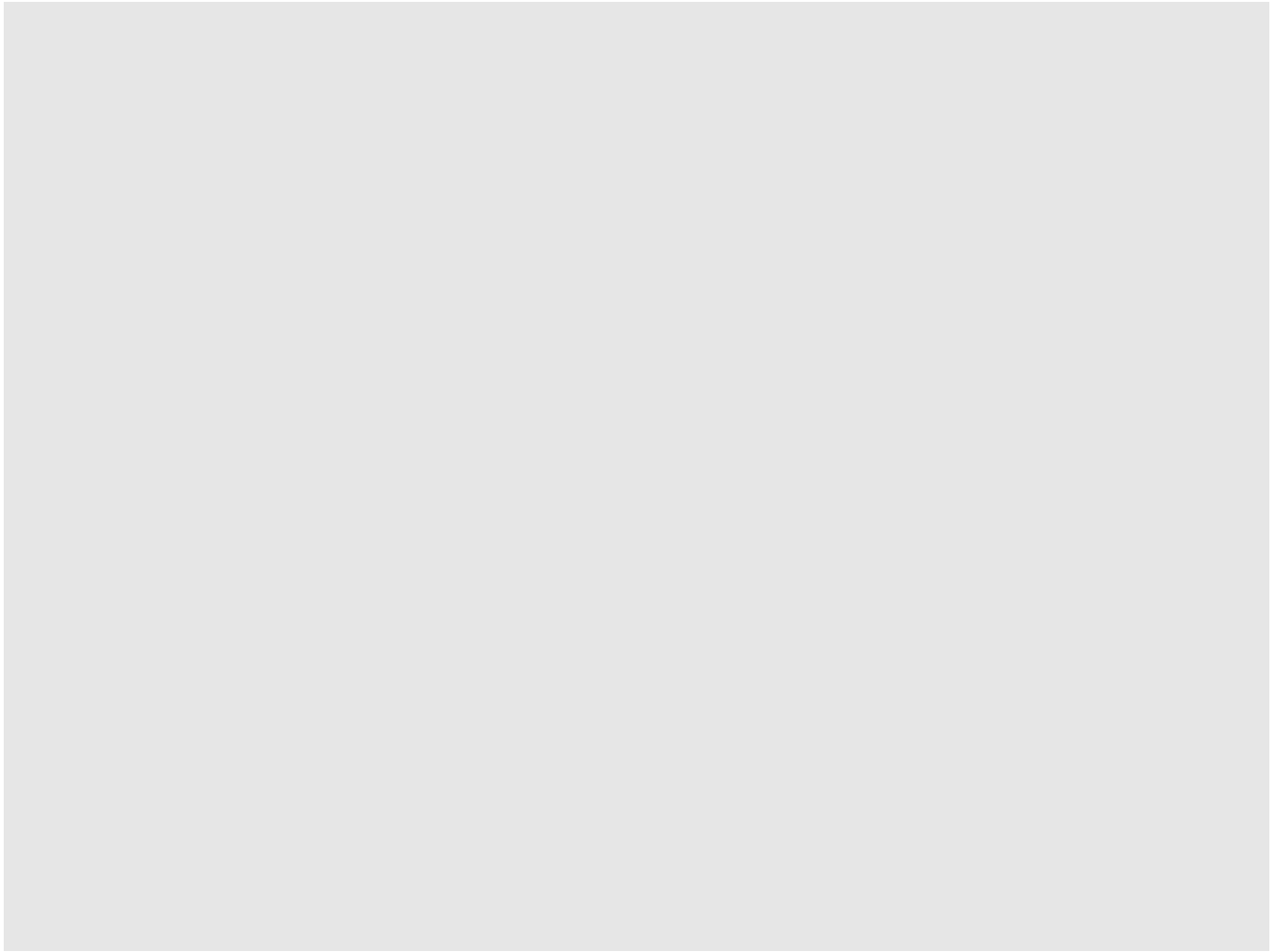
JAMES R. BURNETT, THE WORLD-HERALD

3. Community Corrections Center-Omaha



191.7% of design capacity

2. Omaha Correctional Center



193.6% of design capacity

1. Diagnostic and Evaluation Center



261.4% of design capacity

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This story by The Omaha World-Herald is part of a collaboration with Flatwater Free Press examining Nebraska's prison crisis.

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