

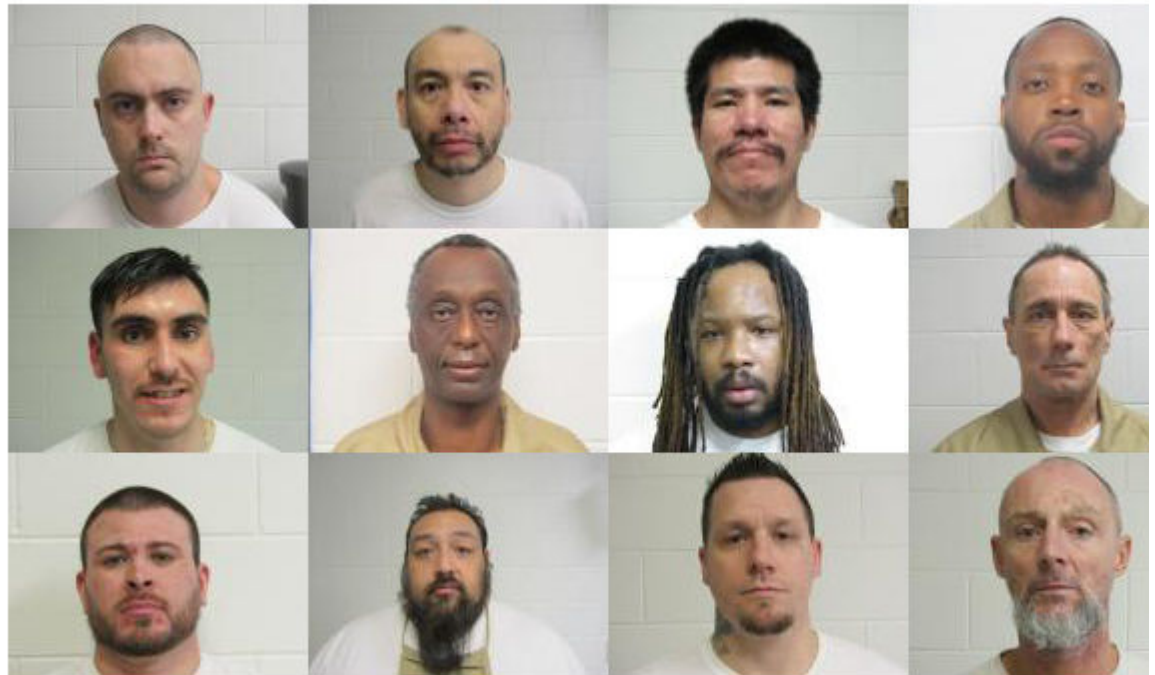
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EDITOR'S PICK TOPICAL ALERT TOP STORY

## Nebraska's habitual criminal convictions fall inconsistently across county, racial lines

Andrew Wegley

Dec 6, 2021



Fifteen men have been convicted in Nebraska this year under the habitual criminal enhancement, which statistics show defendants of color.

Nebraska Department of Corrections

Andrew Wegley

**I**n May 2019, as Scotts Bluff County investigators served a search warrant on a house in Gering, they encountered Jose Roldan, a Latino man living in the western Nebraska city of 8,254 residents.

Inside the 31-year-old's pants pocket was a black container, concealing a baggie of an unspecified amount of a crystalline substance, later confirmed by lab testing to be methamphetamine, according to an affidavit for Roldan's arrest.

He was charged in Scotts Bluff County with possession of a controlled substance, a Class IV felony in Nebraska that most often results in a misdemeanor plea deal or, in some counties, a diversion program.

Alone, the charge can carry a maximum penalty of two years in prison.

But Roldan, now 33, is an inmate at the Tecumseh State Correctional Institution, two years and three weeks into a 10-year prison sentence. His earliest possible release date is Aug. 27, 2029.

Roldan is one of hundreds of Nebraskans in the state's prison system on enhanced charges due to the state's "habitual criminal" designation. Prosecutors can pursue the charge — which comes with a 10-year minimum regardless of the crime committed — when a defendant has already been convicted twice of separate felony charges, serving at least one year in prison each time.

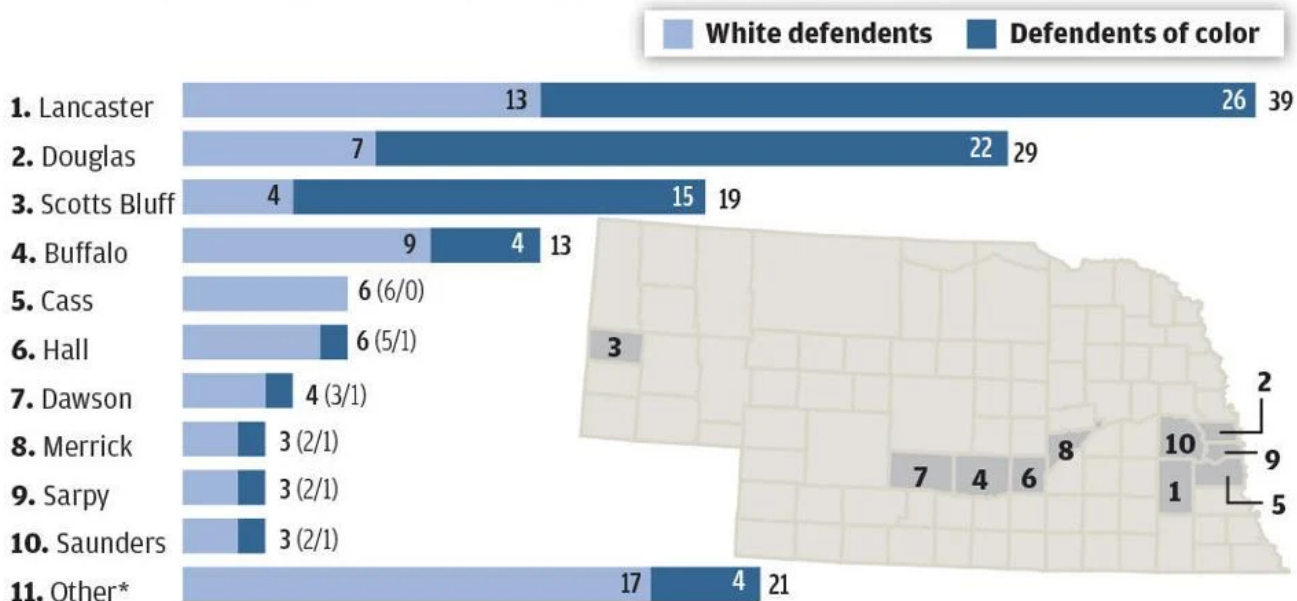
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## Habitual criminal enhanced charges

While the habitual criminal conviction is sought inconsistently across Nebraska, the three counties that have most often pursued the enhanced charge have convicted defendants of color at a disproportionate rate. In Lancaster, Douglas and Scotts Bluff counties, nonwhite defendants have accounted for 72.4% of habitual criminal convictions since 2011.



\*Other includes 18 separate counties with fewer than three convictions each.

Source: Nebraska Department of Correctional Services inmate data

Lee Enterprises graphic

Before his third felony conviction in 2019, Roldan had served a year for delivering meth in 2010 and another five years for dealing the drug inside a school zone, according to Department of Correctional Services inmate data.

He was convicted in a county where prosecutors have sought the habitual criminal enhancement — now rarely used in other parts of the state — with increasing frequency over the past 10 years, according to a Journal Star review of a decade's worth of convictions in the state of Nebraska.

Though habitual criminal convictions represent less than 1% of all inmates admitted into state prisons, their demographics reveal even starker racial disparities than those that exist within Nebraska's general prison population, where 22% of inmates are Black in a state where about 5% of residents are Black.

And the numbers also reveal inconsistencies in the pursuit of habitual criminal convictions statewide, with smaller counties outpacing the state's most populous jurisdictions in recent years.

Forty-six of the state's 146 latest defendants convicted on the enhancement — 31.5% — are Black, according to the Journal Star's review of data dating to 2011.

Another 18 defendants — including Roldan — are listed in correctional services data as Hispanic, while 10 are Native and one inmate is classified as "other."

In all, inmates of color account for more than half of those convicted on habitual criminal charges since 2011, though nearly 90% of the state's residents are white.

"When you wind up with a result like that — that's so disparate — then you have to question what's going on," said Joe Nigro, Lancaster County's public defender.

"How is that the people who have had (cases) result in habitual criminal are so disproportionately people of color?"

## **Data shows racial disparity**

**The Crime and Justice Institute, a nonprofit analyzing a trove of Nebraska prison data as part of the state's criminal justice reform process,** reported there were 161 habitual criminal convictions from 2011 to 2020, a figure that conflicts with findings in public prison population data, where only 131 such convictions were displayed in the same time frame. It's unclear why the numbers don't match.

While the use of the enhancement has ebbed and flowed over the past decade — with 29 habitual criminal convictions in 2014, compared with only seven in 2020 — trends aren't consistent statewide.

Over the past 11 years, it's been Lancaster County — the state's second-most-populous county, trailing Douglas County by more than 200,000 residents — leading the state in habitual criminal convictions.

In that time period, 39 defendants in Lancaster County have been convicted on the enhancement, according to correctional services data. Douglas County, in the same time frame, has convicted 29 defendants on the charge.

And racial disparities among the convictions in both counties mirror statewide trends.

Of the 39 people convicted on the enhancement in Lancaster County since the start of 2011, 26 were defendants of color — including 22 Black defendants, or 56% of those convicted. About 4% of county residents are Black.

In Douglas County, where 11.5% of residents are Black, 21 of the 29 latest defendants convicted on the enhancement were Black. White defendants accounted for only five of the convictions, in a county where 80% of residents are white.

### **Nebraska county jail has violent, strange history**

"I find it incredibly disturbing," Nigro said. "Because it's so out of whack with Nebraska's population."

Dukhan Mumin, a Black man convicted as a habitual criminal in Lancaster County in 2013, has since filed two lawsuits against the county attorney's office, alleging racial discrimination in its use of the enhancement.

Mumin, who has filed dozens of civil suits on a range of topics since he was sentenced to 10-20 years for possessing cocaine, also sued the Legislature over the habitual criminal enhancement. All three cases were dismissed.

### **Decision left to county attorneys**

Lancaster County Attorney Pat Condon, who assumed the role in 2018 after his predecessor, Joe Kelly, was named the U.S. Attorney for Nebraska, said habitual criminal designations aren't contributing to prison overcrowding since they only account for a handful of convictions per year.

"And it's not automatic," he said. "It's not if you have three convictions or two convictions, you automatically get 10 years. I mean, it's something that we have to allege; it's something that we have to prove."

"And there are many cases that we try and we charge that we don't file habitual criminal. It's not worth the 10 years, so we don't file the enhancement."

Less than 0.4% of felony cases have resulted in habitual criminal allegations in Lancaster County since 2011 — though that figure doesn't account for the eligibility of each defendant.

In recent years, Condon and other prosecutors in the state's largest counties have moved away from the enhancement, while prosecutors elsewhere have seemed to flock toward it.

### **📄 Evidence stolen from State Patrol facility results in 66 cases dismissed and potential for more**

Nowhere is that more true than in Scotts Bluff County — the state's seventh-most-populous county, about one-tenth the size of Lancaster County — where there have been 19 criminal habitual convictions since 2011.

Fourteen of those have come since 2016 — the most in the state in the past five years. Of the 14 latest enhanced convictions in the western Nebraska county, 78% have come against defendants of color, data shows, in a county where more than 87% of residents are white.

"Well, I haven't been to Scotts Bluff (County) in 30 years," Nigro said. "But it's hard to believe that crime is that rampant."

Dave Eubanks, who was named the Scotts Bluff County attorney in 2014 after serving for two decades as a private defense attorney, has overseen each of the convictions. Reached by phone, he said he didn't have an explanation for the racial disparity.

"Yeah, I don't know," Eubanks said. "We take the defendants as they come."

Eubanks, from memory, named several of the latest defendants in Scotts Bluff County who are now in jail on 10-year minimums, pointing to lengthy criminal histories, "terrible records" and a general unwillingness to follow the law.

In some cases — including Roldan's — Eubanks said his office had sought the enhancement as a means to protect confidential informants who had helped law enforcement by performing controlled buys of drugs.

And some defendants, he said, had been offered plea deals but opted to go to trial. Others had been eligible for the enhancement previously and Eubanks had declined to pursue it, only for the defendants to wind back up in the judicial system.

"It just gets to a point where they just keep committing felony after felony after felony," Eubanks said. "At some point, you've just got to pull the trigger on the habitual enhancement."

## **Changes would narrow scope**

A similar trend is apparent in Buffalo County, where 13 defendants have been convicted as habitual criminals since 2011, 10 of whom were convicted in the past five years. Four of the 10 people convicted on the charge since 2016 were defendants of color.

In 2021 alone, the two counties have accounted for 10 of the 15 habitual criminal convictions statewide. Lancaster and Douglas counties, where nearly half of Nebraskans live, have convicted four people on the enhancement this year.

"I think there is something going on out in those other counties. Rural counties may be using it too much," said Sen. John Cavanaugh of Omaha, who co-authored a bill introduced earlier this year that aims to alter when and under what circumstances prosecutors can seek enhancement.

"I don't know the answer to why it's disproportionate in those places, but the fact that only 15 people in the state of Nebraska (have been convicted on the enhancement) this year does not tell you how many people pled because of it."

One of Cavanaugh's biggest motivators in proposing LB505, which would largely eliminate the habitual criminal enhancement for nonviolent offenders such as Roldan, is due not to the sheer number of convictions, he said, but because of how

often prosecutors threaten to pursue the charge.

Cavanaugh, a public defender for seven years, said prosecutors use the enhancement as a means to force defendants — who could be facing 10-year minimums if they opt to go to trial — into plea deals.

Nigro, who has been a defense attorney for 38 years, said while prosecutors in Condon's office may have shifted away from seeking the charge in recent years, they still sometimes mention it in initial court appearances — a potential that looms over defendants and their attorneys as they navigate the judicial system.

### Ex-Lincoln police officer sues union for not paying legal bill on sex assault case

"It puts enormous pressure on people to plead, instead of facing such draconian penalties," Nigro said. "And I think that's a misuse of the system."

"It's hard to encourage somebody to go to trial, knowing that if they lose, they're gonna go to prison for at least 10 years — and maybe a lot longer."

Cavanaugh's bill would represent a step forward, Nigro said. But for now, it remains on ice, as the Crime and Justice Institute examines data and gets set to recommend changes in Nebraska, which boasts **the country's second-most-overcrowded prison system.**

But the legislation has a supporter in Eubanks, who said the law's current makeup hamstring judges, taking judiciary discretion out of sentencing equations by requiring a 10-year sentence.

"If it changes, that's fine by me," he said. "I know they're looking more towards violent crime. And I think that would be probably fine. It takes some of that out of our hands."



The bill, though, is a catchall. Cavanaugh said it may help to eliminate outliers such as people incarcerated on simple drug possession charges, but the pursuit of the habitual criminal enhancement would remain subject to prosecutorial discretion — the feature that seems to be the root of statewide inconsistencies.

"Anytime you have flexibility, it can be misapplied or applied wildly differently within the structure," he said.

The state senator admitted he does not expect the bill, in its current form, to pass. Introduced in January, it did not make it out of the Judiciary Committee during the last session, as Cavanaugh's colleagues have expressed concerns over some of the changes it would make.

Among them, Cavanaugh said, would be a change to what kind of felony convictions would count as "predicate" convictions.

Under the bill, some Class IV felonies — including possession of a controlled substance and failure to appear — wouldn't count toward the prior convictions required for prosecutors to seek habitual enhancement.

If the bill were law, at least seven of the 15 defendants convicted on the charge this year would have been ineligible because of the nonviolent nature of their current or previous convictions.

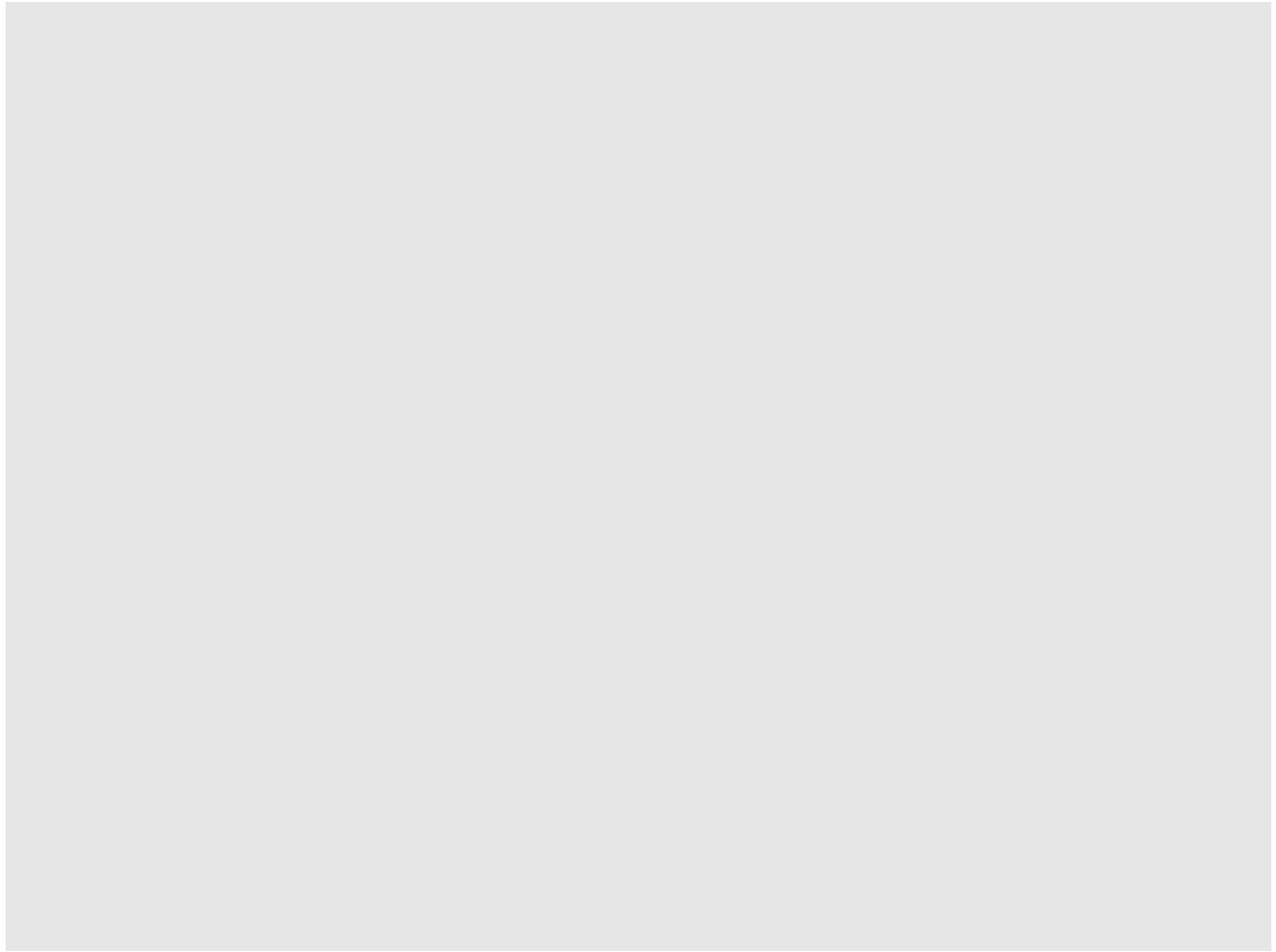
Instead, each of them will remain incarcerated until at least 2030.

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**Nebraska's 10 state prisons from least to most crowded**

## **10. Nebraska Correctional Youth Facility**

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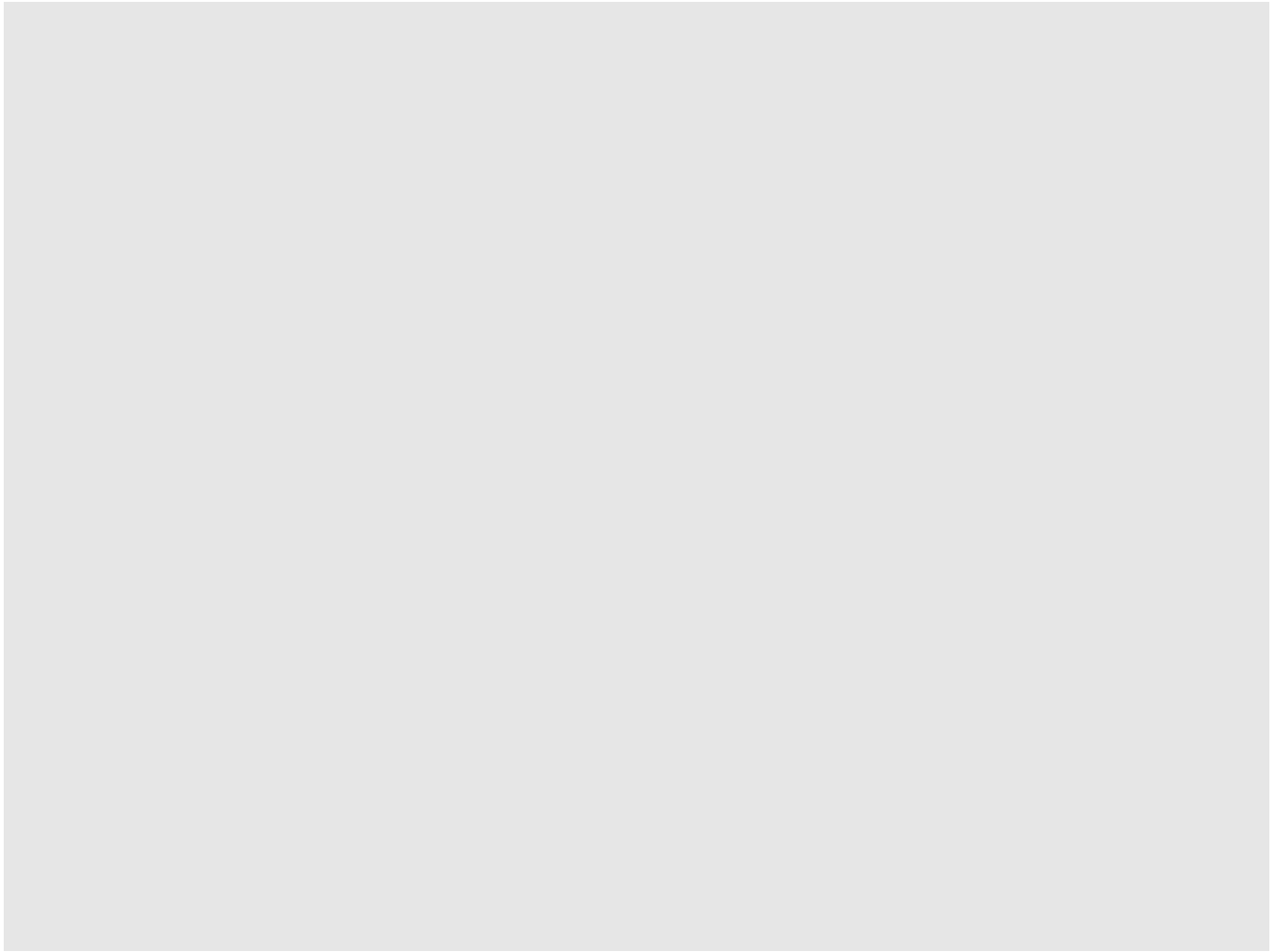
82.6% of design capacity

KILEY CRUSE, THE WORLD-HERALD

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## **9. Nebraska Correctional Center for Women**

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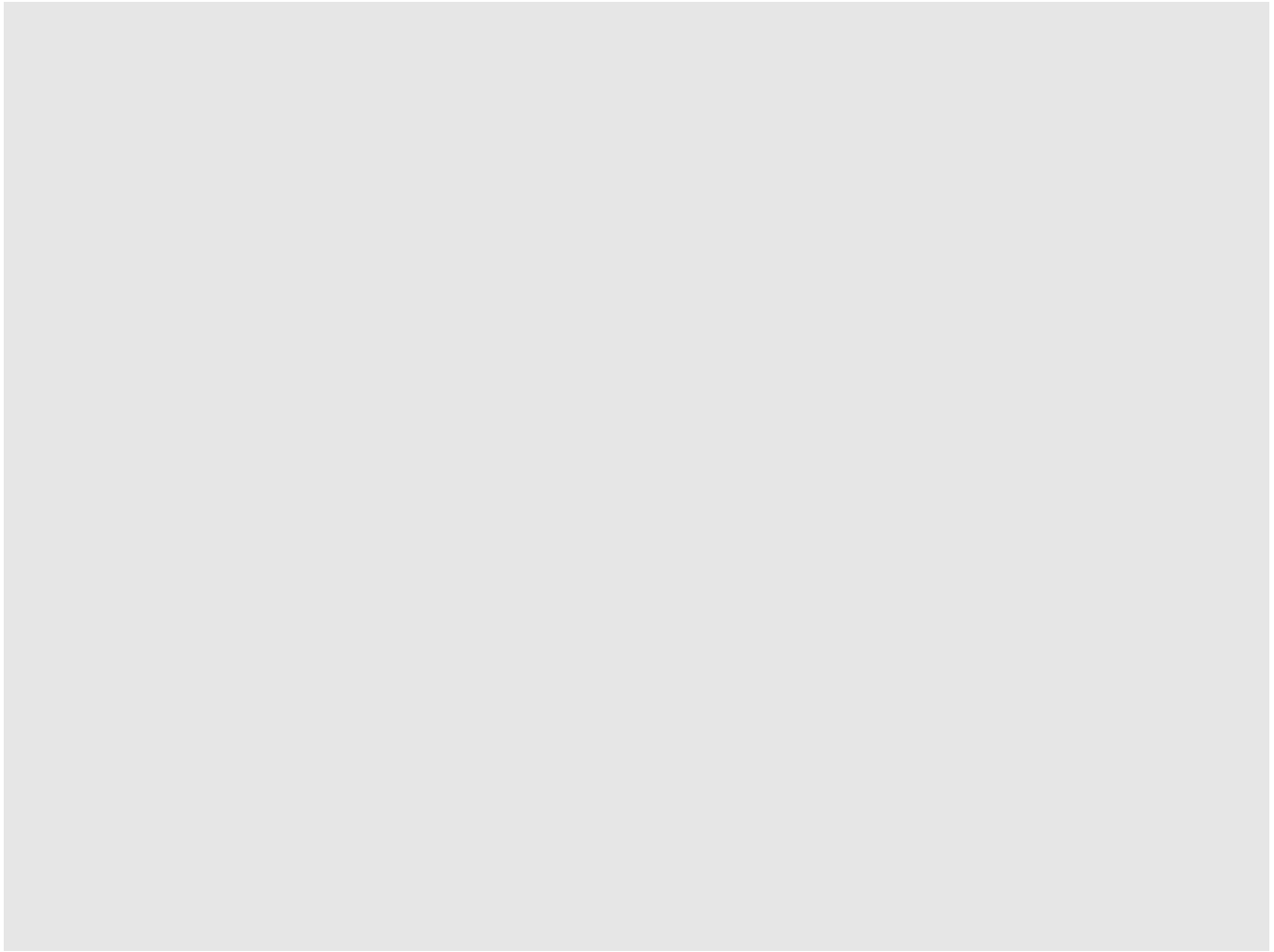
98% of design capacity

THE WORLD-HERALD

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## **8. Tecumseh State Correctional Institution**

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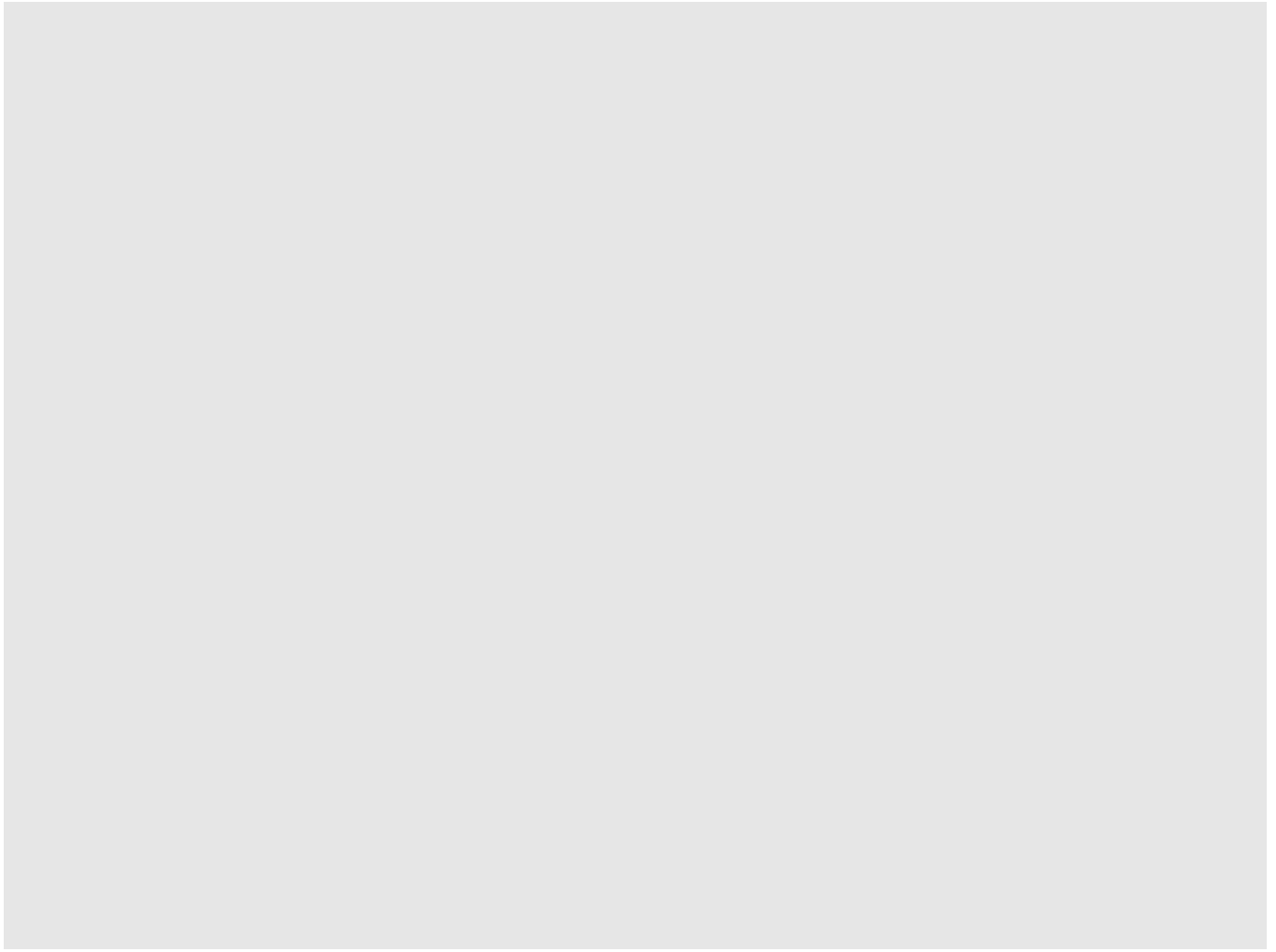


107.3% of design capacity

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## **7. Community Corrections Center-Lincoln**

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132.4% of design capacity

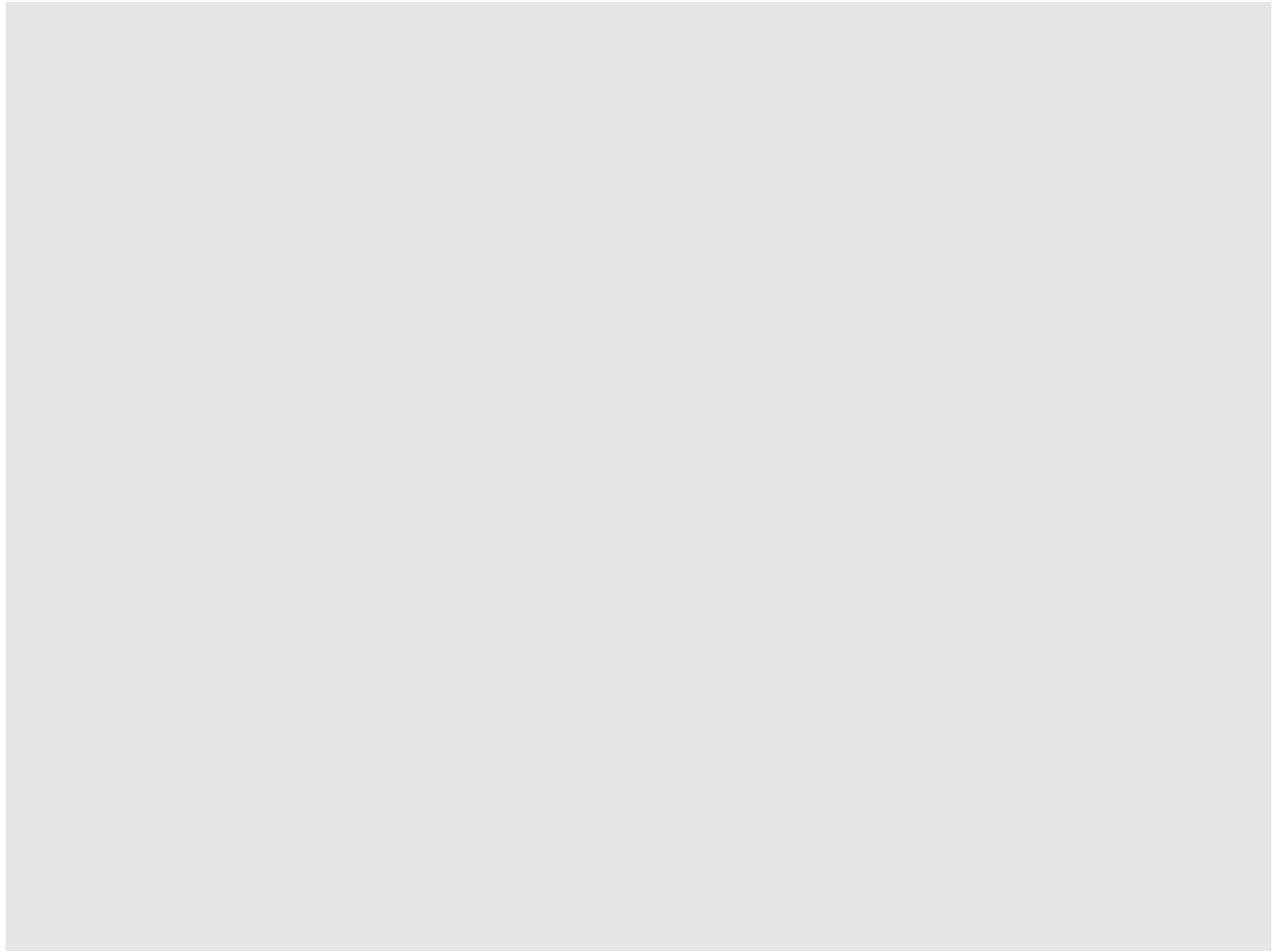
REBECCA S. GRATZ, THE WORLD-HERALD

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## **6. Nebraska State Penitentiary**

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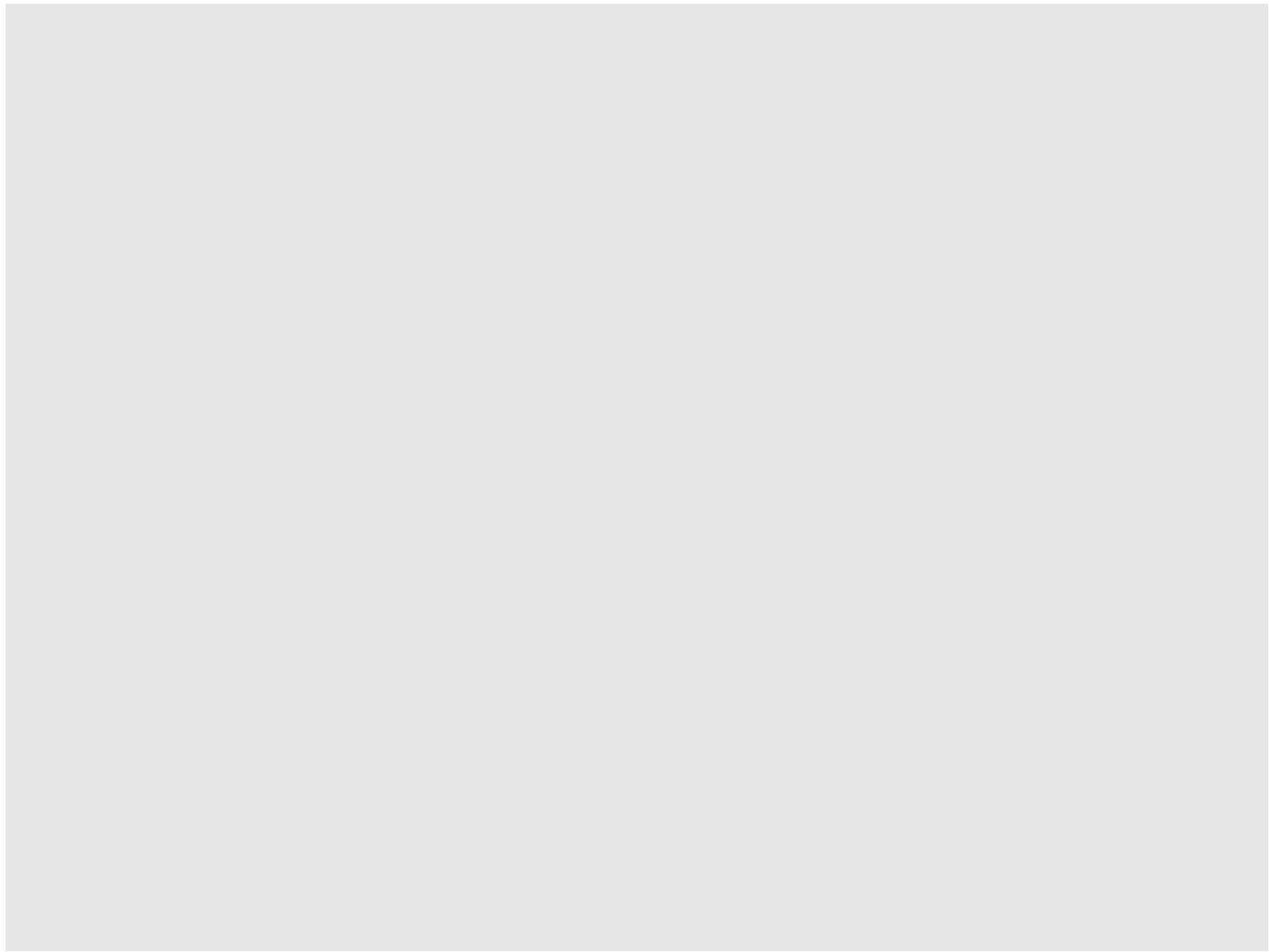
157.5% of design capacity

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES

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## **4. Work Ethic Camp**

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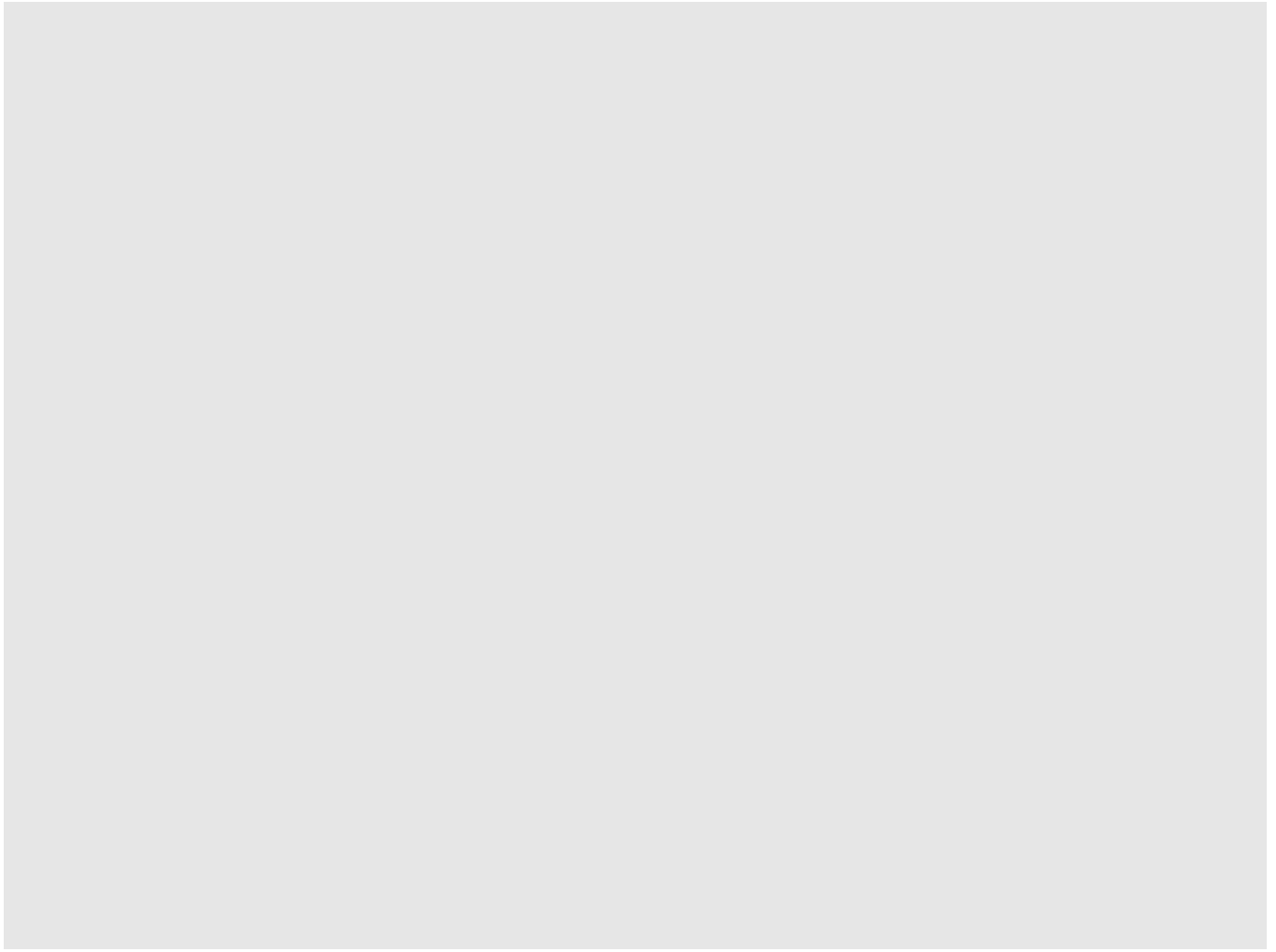
186.1% of design capacity

JAMES R. BURNETT, THE WORLD-HERALD

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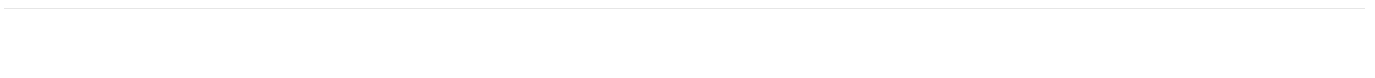
### **3. Community Corrections Center-Omaha**

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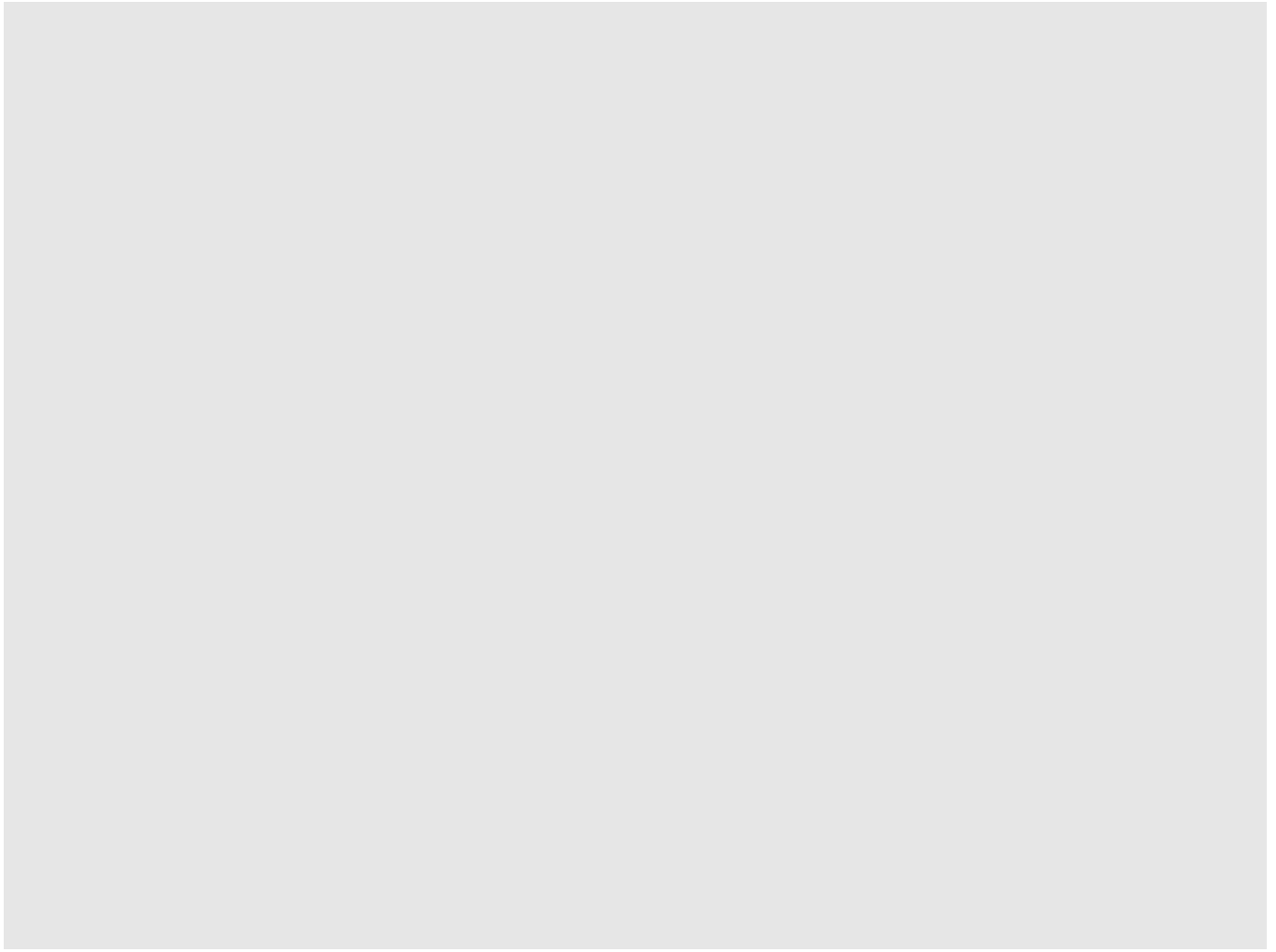


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## **2. Omaha Correctional Center**







193.6% of design capacity

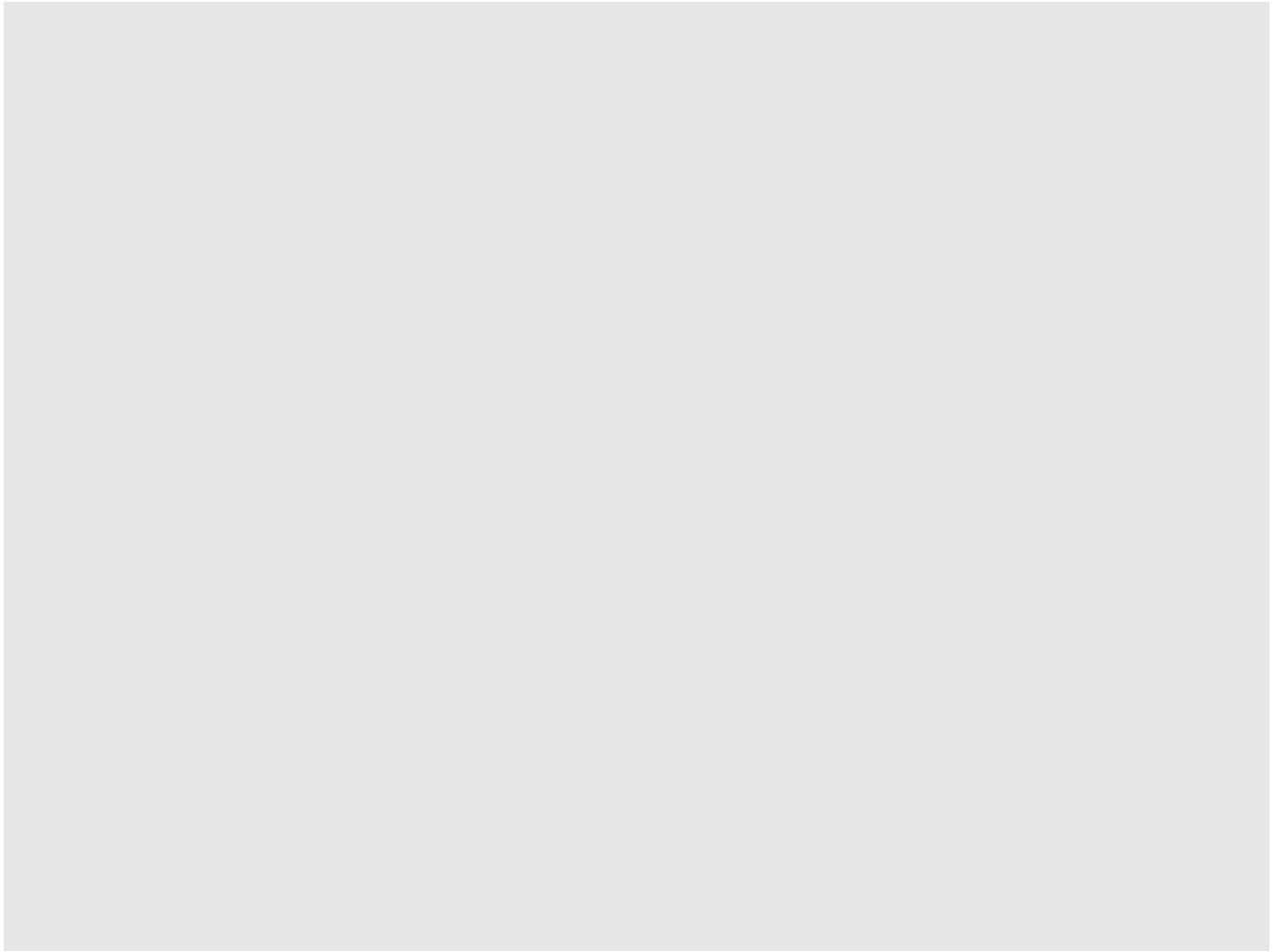
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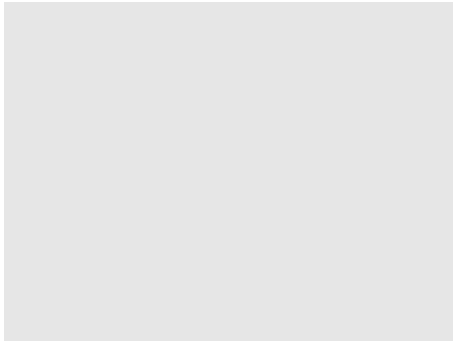
## **1. Diagnostic and Evaluation Center**

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261.4% of design capacity

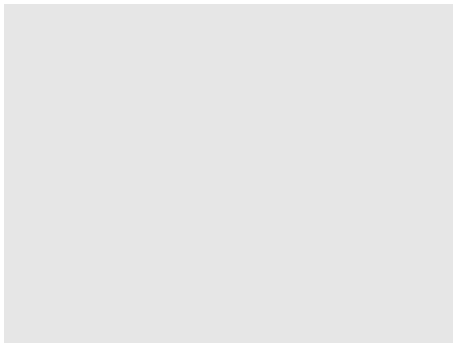
BRENDAN SULLIVAN, THE WORLD-HERALD



Dave Eubanks

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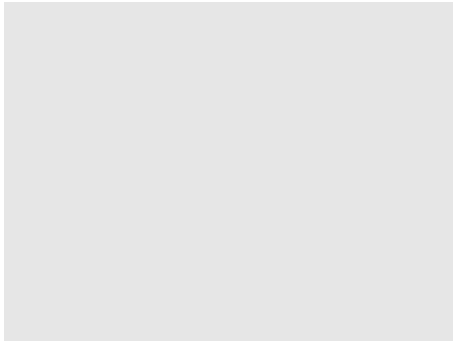
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Joe Nigro

Courtesy photo

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Lancaster County Attorney Pat  
Condon

Journal Star file photo

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## **By Andrew Wegley**

### **Breaking news reporter**

A Kansas City, Missouri, native, Andrew Wegley joined the Journal Star as breaking news reporter after graduating from Northwest Missouri State University in May 2021.

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