EVEN-HANDED JUSTICE IN NEBRASKA: THE PRELIMINARY HEARING AND THE PLEA IN ABATEMENT

RICHARD E. SHUGRUE

INTRODUCTION

In Stone v. Powell, the Supreme Court of the United States put the states on notice that they would become increasingly the last fora for the adjudication of the rights of criminally accused. The decision's withdrawal of federal habeas corpus as a routine remedy for those desiring to challenge the use by a state of illegally seized evidence emphasizes the necessity for the states to fashion fundamentally fair criminal procedures. The formation of fair criminal procedures by the states must be undertaken with reference to federal constitutional standards of due process, state constitutional norms, statutory schemes enacted by their legislatures, rules developed by scholars and practitioners, and respected judicial precedents. Underlying the entire enterprise should be the notion that the end product be an even-handed system of justice.

Stone v. Powell held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search and seizure was introduced at his trial." In its eagerness for swift and final determinations of criminal matters, the Supreme Court all but did away with federal collateral attacks as to search and seizure questions. The Court threw back to the states the real power to make final determinations on criminal procedure questions of this genre.

1. 96 S. Ct. 3037 (1976). The companion Nebraska case was Wolff v. Rice.
2. Id. at 3052.
3. In Stone v. Powell the United States Supreme Court indicated that a convicted person is given an opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review. Id. at 3048. This right of review is ethereal. One writer has observed: "Reliance upon direct review by the Supreme Court as the exclusive means of enforcement [of federal constitutional rights] would be illusory. The sheer volume of the Court's work, not to mention inadequacy of some state pro-
During the years of the Warren Court, the Supreme Court initiated a judicial liberalism which expanded through incorporation the rights of persons under the fourth, fourth, fifth, fifth, and sixth amendments to the United States Constitution. Rightly or wrongly, the pendulum has swung in the Burger Court toward a greater concern for the safety of the state and for the efficiency of the judicial process.

Arguably, what Stone v. Powell really means is that the judicial safeguards of federal habeas corpus review of state convictions are on the wane. The corollary is that the states themselves must see to the guarantee of a fair trial for those accused of crimes.

It is the thesis of this article that while the Supreme Court of Nebraska in light of Stone v. Powell will be the last forum in an increasing number of cases for meting out justice under the Constitution, the Nebraska Supreme Court has retreated from applying some time-honored guarantees of fair play in the criminal process by substituting the plea in abatement for habeas corpus as the procedure for obtaining review of the findings made at a preliminary hearing. It is the author's opinion that the plea in abatement, a little known and anachronistic vestige of the common law, is a poor substitute for traditional guarantees of detached and fair-minded review of criminal proceedings.

7. Stone v. Powell is only one of many cases decided by the Burger Court which sacrificed judicial integrity on an altar of efficiency. In 1976, for example, the Supreme Court eroded fourth amendment protections in United States v. Janis, 96 S. Ct. 3021 (1976), and United States v. Miller, 96 S. Ct. 1619 (1976).
9. See generally 2 Blackstone's Commentaries on the Laws of
THE PLEA IN ABATEMENT

The plea in abatement was traditionally a minor, technically applied, and strictly limited tool used to challenge the error of misnomer or the method of empanelling a grand jury. A body of law was erected around it to isolate it from growing into what might be characterized as a sweeping protection against violations of due process. Both in scope—applying as it did to misnomer and grand jury empanelling—and in process—with its necessity to be presented in near-perfect form prior to a plea to the general issue—the plea in abatement could surely be regarded as a minor planet in a galaxy of protections to assure due process of law.

While recognizing certain traditional restrictions on the use of the plea in abatement, the Nebraska Supreme Court, exercising its own rulemaking power, recently substituted the plea in abatement for habeas corpus in challenges to the sufficiency of evidence at the preliminary hearing. Having adopted the doctrine that the ruling on a plea in abatement is interlocutory in nature, thus giving rise to no right of appeal, the court also negated the fundamental nature of the preliminary hearing when it ruled that any error in a ruling on a plea in abatement is curable when sufficient evidence for conviction is adduced at trial.

The fundamental change in the criminal process in Nebraska can be understood only by reference to two historical threads run-

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3. Austin v. State, 12 Mo. 393, 395 (1849); Priest v. State, 10 Neb. 393, 6 N.W. 468 (1880); J. Bassett, Criminal Pleadings and Practice § 178, 204 n.7 (2d ed. 1885).
4. The plea in abatement has a limited scope. It may be used to challenge the validity of an indictment or information for a defect not apparent on the face thereof and the qualifications of grand jurors or the method of their selection. In addition, the waiver rule (which requires use of the plea in abatement before a plea in bar or a pleading to the general issue) limits use of the plea in abatement. See 2 Wharton's Criminal Procedure §§ 351, 353 (12th ed. C. Torcia 1974).
ning through America's experience: first, the plea in abatement itself; and second, the substitution of the preliminary hearing for the grand jury indictment.

COMMON LAW ANTECEDENTS OF THE PLEA IN ABATEMENT

The plea in abatement was, at common law, a dilatory plea. Cooley in his famous treatise explained:

A plea in abatement is principally for a misnomer, a wrong name, or a false addition to the prisoner. As, if James Allen, gentleman, is indicted by the name of John Allen, esquire, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions. . . . But in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he who takes advantage of a flaw must at the same time show how it may be amended.17

According to Bassett, a plea in abatement shows “some ground for abating or quashing the particular proceeding,” but the “right of a proceeding is not denied.”18 The plea is founded on some defect apparent on the face of the accusation, or on some matter “outside the record proceeding to the insufficiency of the accusation.”19

The principal American contribution to the law on pleas in abatement was its expansion of their availability to decide the issue of the qualifications of grand jurors. The most modern treatise on criminal procedure,20 however, reemphasized the limited scope of the plea in abatement. The plea in abatement is available to attack the validity of an indictment or information for a defect not apparent on the face thereof or to challenge the qualifications of grand jurors or the method of their selection.21 Furthermore, as

17. 2 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 504 (2d ed. T. Cooley 1873).
18. 2 J. BASSETT, CRIMINAL PLEADING AND PRACTICE § 176, at 203 (2d ed. 1885).
19. Id. § 178, at 204. For other early authorities which explain the limited nature of the plea, see, e.g., 1 ARCHBOLD'S CRIMINAL PLEADINGS 110-1 to 111 (6th ed. T. Waterman 1883); 2 BISHOP, NEW CRIMINAL PROCEDURE §§ 791-93, at 613-18 (2d ed. 1913); McClain, OUTLINES OF CRIMINAL LAW AND PROCEDURE 186-87 (1883).
21. Id. § 351, at 273-74.
the doctrine known as the waiver rule is universal in application, the plea in abatement must be interposed before a plea in bar or a plea to the general issue or the objection will be deemed waived.22

In Nebraska, Judge Maxwell's treatise outlined the extremely narrow scope of pleas in abatement.23 Judge Maxwell stated that the plea in abatement may be pleaded "when there is a defect in the record which is shown by facts extrinsic thereto."24 He listed misnomer, failure of a juror to meet the statutory qualifications, and failure to select a grand jury in the manner provided by law as proper instances in which to make a plea in abatement.25 Judge Maxwell also analyzed the kinds of allegations which do not make good pleas, stating:

It is not a good plea in abatement that another prosecution is pending for the same offense, or that there was no evidence before the grand jury on which to find the indictment, nor that the offense for which the indictment was found is not the same as that for which the accused is being tried. It is no objection to an indictment that some of the grand jurors were above sixty years of age.26

THE ROLE OF THE PRELIMINARY EXAMINATION

While the United States Constitution provides for indictment by grand jury,27 the practice in the states has differed materially. In 1884 in Hurtado v. California,28 the United States Supreme Court held that a state can, if it so desires, provide for prosecution by information instead of indictment by grand jury.29 The Supreme Court has never held, however, that an accused proceeded against by information has a constitutional right to a preliminary hearing.30

22. Id. § 353, at 275-76.
23. S. MAXWELL, A PRACTICAL TREATISE ON CRIMINAL PROCEDURE 588 (1896). Judge Maxwell was a Nebraska Supreme Court Judge for twenty-one years.
24. Id.
25. Id.
26. Id. at 559.
27. U.S. CONST. amend. V. With the exception of certain cases, the fifth amendment provides that no person shall be held to answer for a capital or otherwise infamous crime "unless on a presentment or indictment of a Grand Jury." Id. For a discussion of the history of the grand jury both in England and the United States, see R. YOUNG, THE PEOPLE'S PANEL (1963).
28. 110 U.S. 516 (1884).
29. Id. at 538.
30. See, e.g., Lem Woon v. Oregon, 229 U.S. 586 (1913), where the Court stated:  
[A]s this court has so often held, the "due process of law" clause
The purpose of the preliminary hearing is to prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based. This “screening” objective is universally recognized as the principal function of the preliminary hearing.

Although most states permitting felony prosecutions by information require a bind-over following a preliminary hearing as a prerequisite to the filing of the information with the trial court, several states permit an information to be filed without a preliminary hearing. In the latter jurisdictions, the prosecutor’s choice of procedure usually dictates the availability of a preliminary hearing. If prosecution is initiated by filing a complaint before a magistrate, for example, a defendant will ordinarily be given a preliminary hearing. If the prosecutor doesn’t initially file the complaint, however, but files an information at the commencement of the prosecution, the suspect’s right to a preliminary hearing can be foreclosed.

The original constitution of Nebraska did not contain a provision allowing the legislature to enact laws providing for prosecution by information, but shortly thereafter a constitutional convention amended the constitution to provide for such power. In 1885 the legislature quickly exercised the prerogative granted by the new constitution.
The procedure for prosecution on information in Nebraska is presently codified in chapter 29, Article 16 of the Nebraska statutes. Generally, no information can be filed without a preliminary hearing unless such hearing is waived by the accused.

The Nebraska Supreme Court has dictated the scope of the preliminary hearing. The landmark case, Jahnke v. State, involved a challenge to the sufficiency of a preliminary hearing. The task confronting the court in Jahnke was that of establishing a standard by which to determine whether the findings at the preliminary hearing authorized a prosecutor to proceed with the trial of the accused. The court stated:

What the statute evidently contemplates is that when a person is charged with the commission of a felony, before he can be proceeded against by information he must be brought before an examining magistrate on such charge, and that the magistrate shall proceed to hear the complaint and examine such witnesses as are produced in support thereof or to controvert the same, and then exercise judgment or discretion of a judicial character with which he is invested, in determining whether from the evidence adduced, the accused should be held to appear for trial in the district court or should be discharged for want of probable cause, or because it is not made to appear that a crime has been committed.

Interestingly, the defendant in Jahnke challenged the adequacy of the preliminary hearing by interposing a plea in abatement. The court emphasized that challenge by plea in abatement was narrower in scope of inquiry than raising the same question by habeas corpus. Thus, the restrictive scope of pleas in abatement make them an undesirable substitute for habeas corpus.

It is by no means suggested here that Jahnke stands for the proposition that the preliminary hearing was to be a full-blown trial. In fact, the Nebraska Supreme Court has indicated that a preliminary hearing before a magistrate is not a criminal prosecution or trial within the meaning of the state constitution, and the accused "is not entitled as of right to representation by counsel.

40. 1885 Neb. Laws, ch. 108.
43. 68 Neb. 154, 94 N.W. 158 (1903).
44. Id. at 160-61, 94 N.W. at 160-61.
45. Id. at 161-62, 94 N.W. at 161.
EVEN-HANDED JUSTICE IN NEBRASKA upon his preliminary examination." The preliminary hearing is, however, to be an honest exercise of judicial discretion on the issue of whether to bind the defendant over for trial in the district court, taking into consideration the evidence of the state and the defendant. In that respect, the preliminary hearing afforded the accused a far greater degree of protection than the grand jury proceeding, which also had the historic function of determining probable cause. In the latter the defendant has enjoyed virtually no protections afforded by an adversary process.

Three conclusions should be apparent from the above discussion. First, the plea in abatement is an extremely narrow remedy unused at common law and in American jurisprudence except for the most limited of purposes. Second, the preliminary hearing is a wholly legitimate and time-honored process for determining probable cause with a long history of approval by the United States Supreme Court and of practice within the states. The states determine, with minimal intervention from the Supreme Court, the scope of the hearing and protections afforded the defendant. Third, in Nebraska until the last decade, the remedy a defendant could look to for challenging the sufficiency of the evidence at a preliminary hearing was habeas corpus. To be sure, habeas corpus was inefficient and resulted in piecemeal litigation, but if the very purpose of the preliminary examination was to test whether the defendant should be held to answer for a crime, such results were inevitably indicated. Due process, after all, dictates that if one never should

47. Id. See also Svehla v. State, 168 Neb. 553, 568, 96 N.W.2d 649, 660 (1959); Lingo v. Hann, 161 Neb. 67, 74-75, 71 N.W.2d 716, 721 (1955).
49. A preliminary hearing which determines whether the evidence justifies charging a suspect with an offense is distinguishable from the probable cause determination required by the fourth amendment. A finding of no probable cause in the former means that the suspect might not be tried at all. The fourth amendment probable cause determination, on the other hand, addresses itself only to pretrial custody; the sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. While a judicial officer must make this determination, an adversary hearing is not required. Gerstein v. Pugh, 420 U.S. 103, 112, 120 (1975). Because of the limited function and nonadversary character of the fourth amendment probable cause determination, it is not a "critical stage" in the prosecution that would require appointed counsel. Id. at 122. Compare Coleman v. Alabama, 399 U.S. 1, 7-10 (1970), where the Court held that a preliminary hearing was a critical stage of an Alabama prosecution and concluded that the accused was entitled to the aid of counsel at the preliminary hearing.
have been held to answer for a crime in the first place any subsequent proceedings are the ultimate in a mockery of justice.

THE PLEA IN ABATEMENT IN NEBRASKA

The decisions of the Nebraska Supreme Court in the last decade have all but excised the great writ of habeas corpus from the panoply of rights guaranteed to an individual under the state constitution prior to final judgment. An historical examination of the plea in abatement in Nebraska and analysis of decisions rendered by the Nebraska Supreme Court in the past ten years\(^{52}\) reveals an unfortunate step backward in the search for even-handed justice.

PRE-1968 CASES

The plea in abatement has existed in Nebraska case law for more than one hundred years. The earliest case which involved the plea was *Burley v. State*,\(^ {53}\) which was decided just four years after the state was admitted to the union. Shortly thereafter, in *Priest v. State*,\(^ {54}\) a case involving a challenge to the selection of the grand jury by plea in abatement, the court emphasized that the plea must be drawn with specificity, stating facts and not mere conclusions of law.\(^ {55}\) Subsequently, but still early in the state's jurisprudence, in *Cowan v. State*,\(^ {56}\) the court decided that the plea was the proper method for raising an objection alleging that there had not been any preliminary examination of the accused for the specific offense charged in the information before the commencement of prosecution in the district court.\(^ {57}\)

In *Gartner v. State*,\(^ {58}\) in 1893, the Nebraska Supreme Court held that a ruling on a plea in abatement was not a final judgment and therefore not reviewable on writ of error.\(^ {59}\) Also, with respect to procedural aspects of the plea in abatement, it has long been established in Nebraska that a plea in abatement may not be made if a general plea is still of record and not withdrawn.\(^ {60}\) The

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52. See notes 76-94 and accompanying text infra.
53. 1 Neb. 385 (1871).
54. 10 Neb. 393, 6 N.W. 468 (1880).
55. Id. at 396, 6 N.W. at 468.
56. 22 Neb. 519, 35 N.W. 405 (1887).
57. Id. at 522, 35 N.W. at 407.
58. 36 Neb. 280, 54 N.W. 516 (1893).
59. Id. at 282, 54 N.W. at 517.
rationale was that "all defects which might have been excepted to by plea in abatement were waived." 61

The Nebraska Supreme Court, in State v. Bailey, 62 outlined the function of the plea in abatement:

The purpose of the plea in abatement is to challenge the action of the court to defects in the record of a criminal prosecution by averring the facts not apparent on the face of the record which render the proceedings illegal, such as that the grand jury returning the indictment was not selected in the mode provided by law, that the accused never was accorded a preliminary examination for the offense charged in the information, and other similar causes. The object or scope of the plea is not to tender issues properly triable under the plea of not guilty. 63

In Jahnke v. State, 64 the Supreme Court of Nebraska made it clear that pleas in abatement were not broad enough in scope of inquiry to correct errors in judgment by the examining magistrate at a preliminary hearing or to weigh the evidence adduced at the preliminary hearing for the purpose of determining its sufficiency. 65 The defendant challenged the sufficiency of the evi-

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62. 57 Neb. 204, 77 N.W. 654 (1898).
63. Id. at 206, 77 N.W. at 654. The facts in Bailey best illustrate what the court was trying to say. The defendant was charged with selling liquor to two Indians. His plea in abatement averred that the parties to whom the liquor was sold were not Indians and that they were born in Colorado, the sons of an American citizen. The county attorney answered alleging that the father of the buyers had married an Indian and the purchasers were issue of the marriage. The Supreme Court held that the plea "contains no allegation of a single fact which, if true, would make the record defective or entitle the accused to be discharged without trial, but presents matters appropriate to be adjudicated upon a trial of a plea of not guilty." Id.
64. 68 Neb. 154, 94 N.W. 158 (1903). See notes 43-45 and accompanying text supra.
65. Id. at 161-62, 94 N.W. at 161. The Jahnke court stated:
It was not, we apprehend, the intention of the statute that by a plea in abatement errors in the judgment of the examining magistrate should be corrected, or that the evidence introduced should be weighed for the purpose of determining its sufficiency, as might be the case by a reviewing court when the questions involved are those solely of guilt or innocence of the accused.

When the quantity or sufficiency of the evidence to justify the holding of a person to answer for a crime is called in question, as in the case at bar, by plea in abatement, the only question to be considered is with reference to the powers of the magistrate which are called into action in the determination of what shall be the result of such hearing. If he is compelled to act judicially, and to determine as a judicial question the matters over which he has jurisdiction, and does determine such questions upon competent evidence, then an error in judgment as to the result can not be determined by a plea in abatement.

Id. at 161, 94 N.W. at 161.
dence at the preliminary hearing by plea in abatement, and the

_ Jahnke_ court specified that the only question which can be consid-

ered by such a plea was with reference to the powers of the

magistrate. Thus, only where there was no preliminary exami-

ination, in form or substance, could the defendant take advantage

do a plea in abatement.

Although it was clear that a plea in abatement may not be

entered if there is a plea to the general issue on the record, the

question remaining in 1908 pertained to the prerogatives of the trial

court with respect to withdrawal of general pleas. In _Ingraham v. State_, the court ruled that "it is a matter of discretion with

the district court to permit or refuse to allow a plea of not guilty

to be withdrawn in order that a plea in abatement may be inter-

posed." In other words, the withdrawal of a plea of not guilty
to the general issue is not a matter of right in Nebraska.

If a plea in abatement is not sufficient in substance, a county

attorney may demur, or may reply setting forth any facts which

may show that there is no defect in the record as alleged in the

plea. In _Svehla v. State_, the Nebraska Supreme Court re-

fused to hold that upon filing of a plea in abatement, issues must

be joined and pleadings must be filed by the State in response to

the plea. Since the defendant had made no objection that the

State didn't file a demurrer or reply until he moved for a new trial,

the court held that under the circumstances presented by the

record, the defendant failed to show prejudicial error. In other

words, the defendant's failure to comply with the long-standing

Nebraska rule requiring perfection of one's record in both civil and

criminal cases was fatal to his delayed claim.

Analysis of the above cases reveals that the Nebraska Supreme

Court subscribed to the position that the plea in abatement was

an extremely narrow remedy which was not a substitute for habeas

corpus when challenging the sufficiency of evidence adduced at a

66. Id.
67. Id.
68. See notes 60-61 and accompanying text supra.
69. 82 Neb. 553, 118 N.W. 320 (1908).
70. Id. at 555, 118 N.W. at 320. The right to withdraw a plea of not guilty
should not be confused with the considerations involved in the withdrawal of a plea of guilty which were discussed in State v. Evans, 194 Neb.
559, 234 N.W.2d 199 (1975). In _Evans_, the court construed the ABA Standards Relating to Pleas of Guilty. Id. at 561-65, 234 N.W.2d at 201-02.
71. NEB. REV. STAT. § 29-1814 (Reissue 1975).
73. Id. at 564, 96 N.W.2d at 657.
74. Id.
preliminary hearing. Also, the plea in abatement was subject to procedural restrictions which did not apply to habeas corpus petitions: (1) The ruling on a plea in abatement was interlocutory in nature and not reviewable as a final judgment; (2) if the defendant entered a plea to the general issue, he was deemed to have waived his right to make a plea in abatement unless the general plea was withdrawn; and (3) it was a matter of discretion with the district court to permit or refuse the withdrawal of a plea to the general issue.

The Decline of Habeas Corpus

The 1968 decision of the Nebraska Supreme Court in *Kruger v. Brainard* represented a significant turning point in Nebraska's criminal procedure with respect to challenging the sufficiency of the evidence adduced at a preliminary hearing. In *Kruger* the defendant filed a petition for habeas corpus immediately following a preliminary hearing. He alleged that the evidence presented before the magistrate was insufficient to show that the crime charged had been committed or that the defendant had committed the alleged crime. Citing several cases, including *Jahnke v. State*, the court stated "that the question could have been raised by a plea in abatement in the district court in criminal proceeding," or by a petition for a writ of habeas corpus. The court noted, however, that the "disadvantage to habeas corpus is that it allows a collateral issue to be litigated in a separate proceeding"

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75. The rigidity with which the waiver rule has been applied was demonstrated in *State v. Ninneman*, 179 Neb. 729, 140 N.W.2d 5 (1966). *Ninneman* involved a conviction of the defendant for second offense driving under the influence of alcohol. On appeal, the defendant alleged, *inter alia*, the first conviction for driving under the influence of alcohol was void because the first complaint was not sworn to before a judicial officer as required by law and therefore should not be used to prove that he was subject to the increased penalty for the second violation. Although the evidence indicated that the complaint was signed by a deputy county attorney and thus not sworn to before a judicial officer, and that "there [was] little question on the record that the procedure adopted was irregular and . . . subject to a proper objection," the *Ninneman* court held that the defendant, by pleading guilty to the complaint, "waived any objection to it which could have been asserted by a motion to quash or a plea in abatement." *Id.* at 731, 140 N.W.2d at 6-7. It should be remembered, however, that *Ninneman* was decided prior to the adoption of the ABA Standards Relating to Pleas of Guilty. *See* *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975).

76. 183 Neb. 455, 161 N.W.2d 520 (1968).
77. *Id.* at 456, 161 N.W.2d at 521.
78. 68 Neb. 154, 94 N.W. 158 (1903). *See* notes 64-67 and accompanying text supra.
79. 183 Neb. at 457, 161 N.W.2d at 522.
and "results in delay, a proliferation of litigation, and piecemeal review." The Kruger court then exercised its rule-making powers and stated:

It is the considered judgment of this court that the interests of justice will be better served by the adoption of a rule that the question of the sufficiency of evidence at a preliminary hearing may be raised only by a plea in abatement in the criminal proceeding itself.\(^{81}\)

The Kruger decision was shocking in light of the court's previous reasoning in Jahnke. As discussed previously,\(^{82}\) the Jahnke court held that a plea in abatement was not the proper vehicle to challenge the sufficiency of the evidence at a preliminary hearing. The Kruger court, in contrast, relying upon Cowan v. State,\(^{83}\) Jahnke, Hoffman v. State,\(^{84}\) and State v. Moss,\(^{85}\) proclaimed that the plea in abatement was an available remedy for the accused to raise the question of insufficiency of evidence at the preliminary hearing.\(^{86}\) This line of authority, however, did not support the statement of the court. In Cowan, Hoffman, and Moss, the court adhered, as it did in Jahnke, to a limited use of pleas in abatement with respect to challenges of preliminary hearings. The Cowan court held pleas in abatement were proper for raising the question of whether or not there was "any preliminary examination of the accused for the specific offense charged in the information."\(^{87}\) In Hoffman, the court allowed the use of a plea in abatement to attack the sufficiency of a preliminary hearing not the sufficiency of the evidence adduced at a preliminary hearing.\(^{88}\) The Moss court reiterated that when "a defendant was not accorded a preliminary hearing, nor waived it," his claim that he did not receive a preliminary hearing, was "determinable by plea in abatement."\(^{89}\) Therefore, the Nebraska Supreme Court diverged from Nebraska precedent in Kruger by expanding the use of the plea in abatement to include challenges to the sufficiency of the evidence at the preliminary hearing.

In State v. Franklin\(^{90}\) the Nebraska Supreme Court struck the

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80. Id.
81. Id.
82. See notes 64-67 and accompanying text supra.
83. 22 Neb. 519, 35 N.W. 405 (1887). See notes 56-57 and accompanying text supra.
84. 164 Neb. 679, 83 N.W.2d 357 (1957).
85. 182 Neb. 502, 155 N.W.2d 435 (1968).
86. 183 Neb. at 457, 161 N.W.2d at 522.
87. 22 Neb. at 521-22, 35 N.W. at 405.
88. 164 Neb. at 681-82, 83 N.W.2d at 360.
89. 182 Neb. at 506, 155 N.W.2d at 438.
90. 194 Neb. 630, 234 N.W.2d 610 (1975).
final blow in its quest to render ineffective any ancillary proceeding dealing with the sufficiency of the evidence adduced at a preliminary hearing. *Franklin* involved the timely filing of a plea in abatement which asserted that the evidence presented at the preliminary hearing was insufficient to authorize the magistrate to bind the defendant over for trial in the district court. The district court decided this contention adversely to the defendant, and he was tried and convicted. The defendant appealed from this conviction, reasserting his argument regarding the lack of sufficient evidence at the preliminary examination. The Nebraska Supreme Court responded that it would seem highly irrational to reverse a conviction based upon evidence sufficient for a jury to find the defendant guilty, and to order a new trial simply because the evidence at a preliminary hearing was insufficient. The *Franklin* court reasoned:

If the magistrate and the District Court have erred, the error is cured where sufficient evidence to convict is adduced at trial. The practical effect of our holding in *Kruger v. Brainard* . . . may be to make a ruling against the defendant on the sufficiency of the evidence essentially unreviewable by this court after the trial court has on a plea in abatement reviewed the evidence and determined it to be sufficient. On appeal to this court the question then becomes, was the evidence sufficient to support the jury verdict? (emphasis added).

In other words, the court in effect eradicated the primary function of the preliminary hearing—the “screening” objective. The court attempted to justify the reasoning in *Franklin* by pointing out that the objective of the preliminary hearing was “protected by giving the defendant a right, through an appropriate plea in abatement, to a review of the sufficiency of the evidence by the District Court before trial.”

Therefore, from its lowly position in the hierarchy of criminal remedies, the plea in abatement has been elevated by the Nebraska Supreme Court to be the sole instrument which stands between charging an individual with a crime and requiring him to defend himself in a full-blown trial. Clearly, the elimination of habeas corpus review at the conclusion of the preliminary hearing is a material lessening of the rights of the individual.

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91. *Id.* at 635-36, 234 N.W.2d at 614.
92. *Id.* at 636, 234 N.W.2d at 614.
93. See notes 31-32 and accompanying text *supra*.
94. 194 Neb. at 637, 234 N.W.2d at 614-15.
IMPLICATIONS OF NEBRASKA'S USE OF THE PLEA IN ABATEMENT IN LIGHT OF STONE v. POWELL

One interpretation of Stone v. Powell is that, with the exception of federal collateral attacks involving the exclusionary rule with respect to the fourth amendment, traditional federal protections for the criminally accused have not been altered. On the other hand, it may be argued that Stone v. Powell foreshadows the decline of federal habeas corpus review of state convictions, thus allowing the states to develop their own standards for protecting the rights of defendants in criminal proceedings. If this latter interpretation proves correct, should the states be free to retreat from their own established rules of criminal procedure just because the Supreme Court has removed the monkey of federal collateral attacks from the backs of the states? The answer according to Stone v. Powell is that states are free to lessen traditional protections as long as they provide an opportunity for full and fair litigation of the claims of the defendant.95 The significance of lessening traditional protections, of course, is that it might result in a heavy-handed administration of justice.

The Nebraska response to a removal of federal habeas review in most state criminal proceedings can perhaps be predicted by an analysis of Nebraska procedure with respect to challenging the sufficiency of the evidence adduced at the preliminary hearing. Such an analysis is helpful because, with regards to a determination of what is essential to bind a person over for trial, the issue of sufficiency of evidence at a preliminary hearing has never been raised to constitutional magnitude.96 In other words, this issue has been left wholly within the province of state jurisprudence.

95. The Court in Stone v. Powell did not elaborate on the substance of the "opportunity for full and fair litigation" required. A recent Second Circuit decision, however, may provide some insight into the meaning of the "opportunity" which must be afforded. In Gates v. Henderson, 45 U.S.L.W. 2375 (2d Cir. Jan. 12, 1977), the court found two of the six categories listed in Townsend v. Sain, 372 U.S. 293, 313 (1963), relevant in determining whether a murder defendant received a full and fair hearing of his fourth amendment claim in the state courts. In Townsend, the Supreme Court listed six situations in which inadequate state fact finding would entitle a habeas petitioner to a federal evidentiary hearing, and the Second Circuit determined that two of Townsend's categories were satisfied in Gates: (1) The state courts had made no findings of fact and had left the legal grounds for their conclusions unclear; (2) The failure by the state courts to develop evidence crucial to a full consideration of the defendant's claim was not due to the inexcusable neglect of the habeas petitioner. 45 U.S.L.W. at 2376.
96. See, e.g., Capes v. Oklahoma, 412 F. Supp. 1111 (D. Okla. 1975), where the court stated: "The sufficiency of the evidence to support a state
For more than seventy years, Nebraska had considered the preliminary hearing more than just a road sign on the route to a full-blown trial. It was an adverse proceeding in which a magistrate exercised judicial discretion on the issue of whether to bind the defendant over for trial in the district court. From the determination of the magistrate, the defendant could petition for habeas corpus.

Presently, however, habeas corpus does not lie if a defendant wishes to challenge the sufficiency of the evidence at the preliminary hearing; such a challenge may only be raised by a plea in abatement. Foreclosing habeas corpus relief at this stage in the proceeding and leaving the defendant with the plea in abatement insulated as it is with procedural restrictions, defeats the fundamental purpose of the preliminary hearing and offends traditional notions of fair play and even-handed justice. The inherent unfairness involved can be illustrated by the following hypothetical situation.

Assume that a person charged with committing a crime is prepared to offer exculpatory testimony of eye-witnesses at his preliminary hearing. At the preliminary hearing, however, the state offers the hearsay testimony of one witness, and at the close of such testimony, the presiding magistrate orders the accused bound over for trial, refusing to allow the defense to present any evidence. The defendant files a plea in abatement challenging the sufficiency of the evidence adduced at the preliminary hearing which is summarily denied by the district court judge who knows conviction raises no federal constitutional question. A fortiori the sufficiency of the evidence to establish probable cause in a preliminary hearing cannot be considered in a federal habeas proceeding by a state prisoner.” Id. at 1115. But see Freeman v. Zahradnick, cert. denied, 45 U.S. L.W. 3567 (1977) (Stewart, dissenting), where Justice Stewart suggested “that the question whether there was sufficient evidence to support a finding by a rational trier of fact of guilt beyond a reasonable doubt may be of constitutional dimension.”

97. See notes 64-67 and accompanying text supra.
99. Id.
100. See notes 58-61, 69-70 and accompanying text supra.
101. See notes 31-32 and accompanying text supra.
102. While not the general practice, in Douglas County, Nebraska, the author has witnessed a presiding magistrate at a preliminary hearing prevent a defense attorney from introducing any evidence whatsoever. In other words, the probable cause determination made at the preliminary hearing was decided exclusively on the basis of evidence introduced by the state.
that his ruling is not appealable and that any defect in the preliminary hearing will be cured at trial. As the Nebraska Speedy Trial Act provides that the period of delay resulting from filing the plea in abatement until final disposition of such plea is excluded in computing the time within which trial must take place, and as the defendant cannot make bond, the defendant faces custody for a lengthy period. The defendant, realizing the chance that his witnesses may become unavailable during his detention before trial, may very well plead to a lesser charge. He may also decide to proceed to trial; but, even if he prevails on the merits, he was unjustifiably held in custody and faced the humiliation of public prosecution because of the inadequacy of the preliminary hearing. The defendant is in effect denied the protections afforded by the preliminary hearing—the prevention of hasty, malicious, improvident, and oppressive prosecutions, the protection from open and public accusations of crime, the avoidance of subjecting the defendant and the public to the expense of a trial, the shielding of the defendant from the humiliation and anxiety of public prosecution, and the discovery of whether or not there are substantial grounds upon which a prosecution may be based. Clearly, the plea in abatement does not adequately protect the defendant from unwarranted prosecution.

When the Supreme Court in Stone v. Powell held that a state inmate who has had "an opportunity for full and fair litigation" of his fourth amendment claim in the state courts may not relitigate the same claim via federal habeas corpus, the Court did not expand on the substance of the "opportunity" required. If Stone v. Powell is read as an indication by the Supreme Court of its unwillingness to allow federal intervention in all state criminal cases where the state prisoner has had an opportunity for a full

103. See note 59 and accompanying text supra.
106. For an example in Nebraska of this sequence of events, see State v. Sherwood, No. 28-219 (Sarpy County District Court, Jan. 3, 1977). In Sherwood, the defendant was bound over on a felony charge to district court on October 21, 1976 after a preliminary hearing. Pre-trial motions were heard in an omnibus hearing on November 23. Sherwood's attorney filed a plea in abatement on November 24 which the district court judge ruled against on November 30. Subsequently, as a result of plea bargaining, an amended complaint charging the defendant with a misdemeanor was filed on January 3, 1977, to which Sherwood pleaded guilty.
107. See notes 31-32 and accompanying text supra.
108. 96 S. Ct. at 3052.
109. See note 95 supra.
and fair hearing, the states themselves have the awesome task of constructing systems of justice which are applied even-handedly. In order to accomplish such a task, the Nebraska Supreme Court must respond to the following questions: (1) Whether the preliminary hearing is to be adversary in nature, protecting the rights to confrontation of witnesses and the adduction of evidence favorable to a defendant, particularly when he faces incarceration pending trial? (2) Whether the prosecutor alone will be allowed to determine probable cause to bind a person over for trial? (3) Whether habeas corpus should be reinstated as a remedy between the preliminary hearing and the trial in order to preserve the function of the preliminary hearing?

CONCLUSION

Historically, the grand jury stood as a buffer between the power of the state and the criminally accused. Its function was and is to find probable cause that a crime had been committed and that the accused committed such crime. But even the grand jury affords few protections of constitutional dimensions to the citizen whose acts are examined therein, and thus no constitutional problems arose when states substituted the preliminary hearing as a vehicle for finding probable cause. In Nebraska, the accused traditionally had not only the right to present his evidence at such a hearing, but also was allowed to make an effective challenge of the sufficiency of the evidence adduced at the preliminary hearing via habeas corpus which could ultimately reach the Nebraska Supreme Court. The purpose of the preliminary hearing has been defeated, however, by two relatively recent decisions of the Nebraska Supreme Court.111

If a preliminary hearing is to be a protection for the accused, it must be more than an exercise of form over substance. While respect for the rule of law has never required the coddling or freeing of the guilty, it does require more than a cursory bow to the protections which stand between freedom and punishment. The Nebraska legislature has demonstrated some sensitivity to these premises by developing statutory schemes which balance the inter-

110. It can be argued that the current state of the law in Nebraska allows the prosecutor to determine probable cause for bind-over purposes. See note 102 supra. Also, even if grounds are lacking at the time the magistrate is supposed to exercise judicial discretion, any defect will be cured at trial. State v. Franklin, 194 Neb. 630, 636, 234 N.W.2d 610, 614 (1975). See notes 90-94 and accompanying text supra.

est of society with those of the accused. The drafters of the state constitution were no less sensitive in adopting habeas corpus as a protection for Nebraska defendants.

Arguably, what the decision in Stone v. Powell really means is that the federal judiciary will not be there to right all wrongs perpetrated in the name of the state. The United States Supreme Court has said, in effect, that the states are capable of meting out justice with an even hand. Yet, in Nebraska, the highest court has substituted the anachronistic plea in abatement for habeas corpus as the sole remedy available to the criminally accused to challenge the sufficiency of the evidence at the preliminary hearing, thus sweeping away the protections of the great writ and the buffer between a criminal charge and a full-blown trial. It is not without its ironies that the state which stood in the forefront of the development of post-conviction remedies should eliminate an effective remedy for the person charged with crime.

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112. See, e.g., Neb. Rev. Stat. §§ 29-901 to 910, -1205 to 1209, -1804 to 1805.10, -1912 to 1924 (Reissue 1975), which provide respectively for the establishment of a system of bail, conditions of release, and personal recognizance, establishment of a method for computing the time in which a trial must be held, establishment of a system providing public defenders for the indigent, and the establishment of a system of discovery by defendants in criminal cases.
