RESPONSE

MARK JACOBY: The introduction indicated that I was selected for this panel to represent the defense counsel's view. No one had told me that before I arrived here and heard it from our moderator. I just assumed that the other panelists were law professors, and as I had once been a law professor, that's why I was selected. But I will proceed, notwithstanding the evil connotation that has been ascribed to me.

My first observation about the *Kremer* decision is that we are dealing with a problem that poses a very narrow set of difficulties in regard to both our concern for the enforcement of the anti-discrimination laws and our concern for comity and repose between the state and federal governments. This point is articulated well in both the majority and the dissenting opinions in *Kremer.* The majority and dissent agree that if Mr. Kremer or any other complainant proceeded with a discrimination complaint before a state agency and that proceeding was not carried on into state court, the complainant would not be precluded from going into federal court with a *de novo* Title VII action. The majority and dissent likewise apparently agree that if a complainant proceeded directly in state court with a state discrimination complaint and there was a summary judgment disposition for defendant, complainant would be precluded from going into federal court with a *de novo* Title VII action.

Under the New York Human Rights Law, a discrimination complainant can either file a complaint with the Human Rights Division or file suit directly in New York State Supreme Court. As I said a moment ago, both the majority and dissent in *Kremer* seem to agree that if the complainant proceeds directly in state court and receives a final disposition on the merits, that disposition will be given preclusive effect. The narrow situation we are dealing with here is one in which a state court judgment has arisen out of review of a state agency determination.

In New York, that situation can arise in two possible settings. One scenario is when an investigatory fact-finding proceeding results in a "no probable cause" decision by a regional director of the Human Rights Division, that decision is appealed to the Human Rights Appeal Board (since abolished) and is then appealed to the Appellate Division of the Supreme Court, and perhaps, to the New York Court of Appeals. Here we are dealing with judicial review of the administrative "no probable cause" decision.

The other scenario is one in which an administrative "probable cause" finding has been made. The case then goes to a public hearing before the State Human Rights Division. A hearing examiner conducts a trial, witnesses are called and testify under oath, and there is cross-examination — all in all, very much the same procedures as one would have in a state or federal court action. The complainant receives an adverse decision after that full administra-

tive trial, and then the case proceeds up through the courts for review. Here we are dealing with judicial review of the administrative decision after an administrative trial.

The *Kremer* decision obviously involves the former scenario — the review of a "no probable cause" determination — and the conclusion of the Supreme Court is that there is preclusive effect if that case is reviewed by the state court. And, of course, it then follows, *a fortiori*, that had Kremer received a probable cause finding, but then received an unfavorable decision after a full trial before the Human Rights Division, which was unsuccessfully appealed to the state courts, the state court decision would be given preclusive effect.

There are, it seems to me, two basic legal issues posed by the opinion in *Kremer* and the analysis presented this morning by the panel. One is the question of the accomodation to be made between the statutory full faith and credit provision, 28 U.S.C. § 1738, and Title VII. The second is the question of the due process standard to be applied in deciding whether to grant preclusive effect under the statutory full faith and credit provision.

As to the first question, the accomodation of the full faith and credit statute with Title VII, it seems to me that the majority and dissent in *Kremer* have a real good go at one another. My own view is that neither side is overwhelmingly persuasive. In the final analysis it's kind of an inconclusive fight, although we know who won on points — or, in this case — votes. The inability of both the majority and the dissent to muster an overwhelmingly persuasive argument flows from the fact that we do not have an authoritative legislative history of Title VII, probably because of the way it was enacted. This particular issue resolved in *Kremer* is but one of many issues that have remained unclear for many years because of this imperfect legislative history.

As to the second issue, the question of whether or not Mr. Kremer has been afforded due process in the "no probable cause" procedure and state court review thereof, prior speakers on this panel mount a very heavy challenge to the Supreme Court's decision. I would not attempt to meet that challenge directly because I have not reviewed authorities on the due process issue in some time. I would point out, however, that the dissenting Justices in *Kremer* do not even so much as hint that they see a serious question as to whether or not the state procedure met minimum due process standards.

Bear in mind, that while Mr. Kremer was acting *pro se* in the state proceedings and initially in federal District Court, he was well represented in the Court of Appeals and before the Supreme Court. It is evident that the due process issue was raised, because the majority discusses it, but the dissent does not deal with it at all. I suspect that is because there is no compelling legal precedent to support the view that due process requires a full-blown trial with the opportunity to cross-examine adverse witnesses. I do not think that is what due process has ever required, and indeed, our Federal Rule 56 would be in jeopardy were that true.

I also believe that Pamela does a disservice to the state agencies in

describing what the investigatory fact-finding process is like and in describing what the "no probable cause" decision means. In the written paper on which she bases her remarks this morning, she indicates that to avoid a "no probable cause" finding, a complainant must convince an investigator that he or she will probably win. That is not what a "no probable cause" finding means, and I do not accept that, as a matter of law or as a matter of practice. That standard sounds very much like what one needs to get an injunction in court. My experience is that the "probable cause" fact finding is more like a summary judgment proceeding, albeit done on an informal basis and perhaps on an ex parte basis. In other words, both sides may not be put in the same room with the right to cross-examine one another.

In the investigatory phase, the complainant has a full opportunity to present evidence to form the record. Indeed, the complainant is given unlimited breadth to present written or oral evidence, hearsay or otherwise. No limitations are imposed on what the complainant can put into the record. This is not the case in a typical court proceeding, where there are evidentiary rules that preclude you from presenting various kinds of evidence. In addition, one has the opportunity to ask the state agency to subpoena evidence. If the complainant makes a case for issuing a subpoena, it will always be issued. One also has the opportunity to see everything that is put into the record by the employer. If the employer chooses to put anything in the record, the complainant will be given an opportunity for rebuttal. Again, that rebuttal is not limited in scope or by evidentiary rules.

So I believe that there is, in the traditional sense, a full opportunity for the complainant to be heard in a state agency investigation. And although this opportunity will not include cross-examination of adverse witnesses, if there is a fact-finding conference held, the complainant would be permitted to suggest questions to the agency representative who conducts the conference. I therefore view the probable cause determination as very much like a summary judgment determination because, in practice, if the complainant has put forth anything that leads the state agency to believe that complainant might prevail, a probable cause finding will issue and the case will go to public hearing.

I believe that the issue posed in the *Kremer* case is not only a narrow one in terms of legal precedent, but frankly one which will be of little practical significance in the future. Any complainant can avoid the risk of being precluded from proceeding in federal court simply by not appealing an adverse state agency decision to the state appellate courts. And I do not believe that there is great risk that an employer can drag an unsuccessful and unwitting complainant into state court and obtain a decision with preclusive effect there.

The *Kremer* decision thus is of narrow practical significance because if a complainant wants to proceed through the state administrative procedures and then wants to appeal an adverse ruling to the state court, he or she has that choice. And if on the other hand, the complainant is intent upon pursuing a Title VII action in a Federal court, he or she is able to do so. That may

not be of much help to poor Mr. Kremer, who apparently did not know the score when he went into state court, but that is a potential problem for every litigant. Frankly, I do not believe that our sympathy for Mr. Kremer and his personal plight ought to change our views on how our legal system should operate. Also, I have searched in vain through the District Court opinion, the Court of Appeals opinion, the Supreme Court majority and dissenting opinions, and Pamela's very extensive and thoroughly researched paper, for one word suggesting that Mr. Kremer had any valid claim of discrimination. There is no evidence that there was, indeed, any *bona fide* discrimination issue here, or that he was prejudiced in the least by the procedures followed.

In my view, the dissenting justices in the *Kremer* decision overstate the harm that they see resulting from the outcome of this particular decision. They suggest that complainants who proceed before state agencies will avoid state court review in order to file Title VII actions in federal court and that this will result in a deterioration of the states' anti-discrimination agencies because of the absence of regular state judicial review. This thesis is entirely theoretical, and is unsupported and unconvincing. If a complainant goes through a full-blown agency proceeding with a trial on the merits and believes there have been mistakes made that can be corrected through state court appellate review, that is the remedy that the complainant will pursue. And if, on the other hand, the complainant wants to start over again with a Title VII action, that choice is available.

Having said all of this in apparent defense of the *Kremer* decision, I would conclude only by commenting that I do not personally believe that the result in *Kremer* is necessarily the best possible result. I would not have been concerned had it been decided the other way. As I indicated, I do not believe that the *Kremer* decision does terrible harm to the enforcement of the anti-discrimination laws, nor do I believe that an opposite result in that case would have done terrible harm to the concern for comity and repose.

Frankly, common sense would suggest that if a complainant has gone through a full-blown trial before the state anti-discrimination agency and has lost, the concern for comity and repose favors giving preclusive effect to that administrative decision even if no state court review is sought. Certainly, a more compelling case can be made there than in the factual setting of the *Kremer* case.

RESPONSE

LEROY D. CLARK: I basically agree with the thrust of Professor Mann's paper but let me suggest some problems that I see with it. In the first place, I think a major problem that was not dealt with in her paper, nor in the *Kremer* opinion, is exactly the point that former-Professor Jacoby mentioned, namely that the charging party was without counsel. While the charging party was represented at some later stages in the New York state court proceedings, he was not represented when he made the critical decision to seek an appeal in the state court system. Had the charging party been in federal court, he would have had the right to appointed counsel. It is possible that Kremer might have claimed the state proceeding was completely null and void because the state failed to appoint counsel for him in the state court appeal, but the law on the right to counsel in civil (as opposed to criminal) cases is primitive. As I recollect, the Supreme Court has gone as far as to say that a court does not have to appoint counsel for litigants in civil cases even where the state is attempting to take custody of a child. This lack of protection may have dissuaded the attorney for Kremer from raising such a claim.

Secondly, I agree with Mr. Jacoby that the decision probably does not have enormous implications for the future. It would probably be unwise, after *Kremer*, for any charging party to appeal a decision where the state administrative agency had found "no probable cause." The thing to do would be to get out of the state forum right away and go immediately into the federal system. There, at least, one would have the option of a trial *de novo*, precluded here by what Professor Mann called the "very narrow scope" of the New York court's review.

What I am more concerned about, however, are the post-*Kremer* cases, which Professor Mann discusses in her paper, involving charging parties who might previously have obtained federal jurisdiction, but were forced to stay in the state court system because the defendant employer appealed in the state court system. This appeal effectively limited the charging party to inferior relief than what she might have received in a trial *de novo* in the federal court. Again, however, a large part of my concern here is that the charging party may be unrepresented in the state court proceeding which can then be used to preclude her from a trial *de novo* in federal court.

Now I would like to make a couple of criticisms of Professor Mann's approach. In the first place, I would read the Supreme Court decision in *Kremer* as applying specifically to the kind of administrative agency involved in the case. State administrative agencies in the anti-discrimination arena are not like courts in that they take a totally neutral view toward the parties in the action. Indeed, such state administrative agencies have a quasi-prosecutorial role; they have a statutory responsibility to eradicate discrimination. By and

large, they are going to look quite sympathetically at the allegations of the charging party. Perhaps the Supreme Court decision therefore has to be read in the following light — where you have a state agency that is likely to protect the charging party, and that agency decides that there is no case, if there is subsequent review by a state court, then the charging party is precluded from subsequent federal review.

I also disagree with Professor Mann's hypothesis that the agency might have found "no probable cause" because of a case load problem, rather than as a result of investigation. Any state agency can deal with caseload problems straightforwardly. If they do not want to hear a case because they do not have the resources or the time, they just do not have to deal with it at all. They could simply direct the charging party to the federal agency (EEOC). They do not have to take the case, and then say falsely that there is no probable cause. Further, while the dissent in *Kremer* quarrels with the majority's characterization of what dismissal in the state court meant, or rather what the finding of "no probable cause" meant, the Court very clearly says that they are treating the finding of "no probable cause" pretty much as a finding that as a matter of law there was nothing to the charging party's case. I think that only those state agency determinations that have that character ought to be given preclusive effect. I have one other minor criticism of Professor Mann's paper: she poses the scenario of a state agency that is hostile to the charging party, and, I assume, deliberately gives the charging party half a loaf. This would presumably enable the employer to take an appeal to the state court, thereby precluding the charging party from getting full relief. Now I just think that scenario is unreal. The political realities of 1984 are quite different from the conditions which existed before 1964. I do not believe that you can show that any southern state agency today, explicitly or covertly, systematically sells minorities or women short. Blacks are too strong politically in the south, as we are going to see with Reverend Jesse Jackson's campaign for president, and women are certainly more politically conscious and active today. Those are the two major groups I think that one has to be concerned about. By and large, I think that state agencies, certainly the ones that I had contact with when I was General Counsel at the Equal Employment Opportunity Commission, are sincere and anxious to perform their role well. When they do a bad job it usually is not their fault, but a problem created by the state legislature not providing them with the financial resources to do a better job. Therefore, I just do not believe that the scenario she paints of a subversion of Title VII rights by hostile state administrative agencies is likely.

RESPONSE

JONATHAN HYMAN: I would like to touch on several reverberations of this case. On its face the case presents a very narrow issue. It involves a complicated procedural arrangement established by Title VII, a multi-faceted state procedural system and the technical question of how to meld these two schemes. But I see in the decision of the case three larger themes that I think help to explain why the Court decided it as it did. The first is what I might call the triumph of parity, that is, the notion that state judicial or administrative procedures are entirely equivalent to federal courts and federal procedures. The second is a diminished notion of due process coupled with a bit of a revival of a distinction between rights and privileges. The third theme that I see is an interest that the Court has in finding means to resolve disputes other than formal litigation.

Let me describe each of these in a little more detail. This case indicates the triumph of the notion of parity because it seems to establish, as several other cases have, that there is nothing preeminent about the federal courts. While federal law is supreme, and both federal and state courts are obliged to follow it where it applies, there has recently been some question as to whether that supremacy goes a little bit further and implies that the federal courts are supreme over the state courts. There was some judicial language to that effect at the height of the civil rights movement in the 'fifties and 'sixties when the Supreme Court was trying to desegregate the South, but it has been pretty well abandoned. Instead, the tenth and eleventh amendments have been given new life by the Supreme Court, increasing the sense of the importance and independence of the state courts. This carries with it a corresponding impression that the federal government is no more than a fifty-first state. As a mere fifty-first state, its courts have no greater claim to judicial power and no greater obligation to be open to people claiming violations of federal law than the courts of any other state.

This is apparent in the *Kremer* decision, in the way the Court handles section 1738 of the Judicial Code, the "full faith and credit" statute. The Court used a broad reading of Section 1738 to turn the *Kremer* issue into a deceptively simple one of statutory construction. Section 1738, which requires full faith and credit for prior state decisions, appears to conflict with Title VII, which authorizes a de novo trial in the federal court. How should the Court put these together? To say, as the Court does, that the earlier and more general statute prevails buries a lot of presumptions and tendencies that the Court does not explain to us. This is not unique to Title VII issues. The Burger Court has on other occasions taken general jurisdictional statutes and by interpreting them in a broad and literal way has created powerful rules that keep parties out of federal court. The statutes are vague and general; there is no

legislative history or other substantial indication of precisely how Congress meant to handle this problem if it came up. Nevertheless, the Court has thought it appropriate to interpret a general statute in a way that precludes federal court jurisdiction. The Court somewhat obscures the significance of its action by implying that Congress could always change the result. That does not explain, however, why the general statute that prevents federal jurisdiction should be favored over the specific statute that could plausibly be read to authorize it. The Court puts the burden of overcoming legislative inertia (if I may use a phrase of Dean Schmidt of Columbia in this forum) on the parties that favor federal court jurisdiction. Congress has at times acted to change a judicial interpretation, but not often, and particularly not now, when the strong civil rights consensus of the 1960's has disappeared.

To close the issue of parity, let me note that the Court is making the issue simpler than it really is. It is not satisfactory to say that the courts of the United States are just like the courts of a fifty-first state. The United States is not a fifty-first state. It does not have a separate geographical jurisdiction. It does not have a general body of substantive law that governs the primary relations of the citizens within it. Federal law is not just interstitial either, doing little more than filling gaps in state law. Federal and state laws are largely interlaced. The state and federal rights we carry with us are all mixed up the same bundle. The analogy between "full faith and credit" between two states and "full faith and credit" between the federal and state governments is not complete. Because of this, the parity notion, which the Court is so anxious to use to enforce the finality of state court judgments, becomes a flawed tool for handling the problem of parallel pending actions, one in state court and one in federal court. If you follow the cases that have tried to deal with this problem, which is a spinoff of the abstention doctrine, you find that the Court is in a real muddle. It does not have any clear idea of how it should decide which forum is to be preferred. Since the idea that the federal government is a mere fifty-first state cannot resolve the recurring and troublesome problem of parallel suits, the Court has yet to give a satisfactory explanation of why it should be used to prevent federal court adjudication of federal law in cases like *Kremer*.

Let me talk briefly about the other two themes that I see in this case. One is a limited state-oriented concept of due process. Although the due process issue is not explored in the *Kremer* decision itself, I detect here a kind of deference to the state's authority to provide whatever process it wants to, as long as it is state law that the state is enforcing. The *Kremer* Court gave *res judicata* effect to the state decision without establishing that the state process was the substantial equivalent of a federal court trial. If the state wants to define rights on some very narrow or minimal basis, the state can also provide a limited administrative procedure for enforcing those rights. When it comes to plaintiff's claim, which is what we're talking about here, the due process limits on what the state can do are very minimal. The *Logan* case that Pam mentioned sets a limit: the state cannot randomly decide which discrimina-

tion cases to hear. But beyond that, the state can define rights and define procedures accompanying those rights in a very minimal way and the Supreme Court will give deference to that. This is probably a one way street. Although plaintiffs can be given a very limited kind of procedure, due process would probably require more when defendants are trying to resist the enforcement powers of the state.

The third theme that I see in this case is an attempt to find alternate methods of resolving these disputes apart from litigation. The Court favors an informal investigatory process as a substitute for trial. The result of *Kremer* is to uphold the result of the informal investigatory process conducted by the state agency. Although Mark mentioned that in New York the plaintiff has the option of a trial — which everyone would agree is the standard model of due process — there is nothing in *Kremer* that suggests that this right is a necessary part of the Court's holding. The Court is quite happy to encourage the use of informal investigatory decision-making rather than formal adjudication because it is very much interested in getting cases resolved while keeping them out of court. One of the faults of the *Kremer* decision is its failure to analyze the implications of this.

Let me discuss it by way of analogy with criminal procedure. In criminal procedure there is a similar distinction between the Anglo-American method of conducting criminal trials — the accusatory system — and the continental inquisitorial system. The continental system does not permit the development and presentation of cases, as here. Instead magistrates investigate the case, take evidence and present a neat bundle to the adjudicatory body. That body basically reviews the evidence that has been collected and analyzed by this independent administrative investigator. The argument has been made by several people that the criminal justice system in this country would be better if we adopted such a system instead of relying on the model of a full blown adversarial trial to resolve disputes.

One of the problems with adopting such a system is the great difference in how these bureacratic systems work in Europe and in the United States. In Germany, for instance, the investigating magistrates are controlled by a central bureaucracy. It is a full-time profession with substantial prestige. It incorporates a lot of control and training, and inspires a lot of trust that it is capable of producing a fair and accurate determination of guilt and innocence. But it is difficult to say the same thing about the criminal law field in American jurisdictions. We have numerous local criminal law jurisdictions, many quite different from each other, and many are deeply influenced by politics. Many officials are elected. There is no tradition of bureaucratic excellence. There is no tight control from the top.

These same concerns apply to an administrative, bureaucratic system such as the New York system in the *Kremer* case. The investigator is given great power; should we trust its use? In *Kremer* the investigator looked at the facts and made a determination; but why should we trust his judgments? Are

investigators trained well enough? Is this a long term career pattern that has good controls from the top? How do we correct for excesses? How do we correct for blindness or partial vision in some of these people? How do we know what's going on in their heads?

We have heard very different characterizations from Pam and Mark of what the very same investigators do. Pam, speaking from experience working on behalf of complainants, tells us that unless the investigator is struck by the overwhelming wrongness of what went on, the investigator will not pursue the case any further. Mark, who comes at it primarily from experience representing defendants, says these investigators will jump if they see the least bit of evidence that suggests discrimination.

I do not know which one to believe. We do not have a good system for deciding when the bureaucracy and the inquisitory investigatory type of system produces results that we trust. So, instead of that, we rely on the adversarial process, in which the parties retain much more control over the development of facts, of showing the implications of the facts, the presentation of implications to be drawn from the facts and the effort to persuade a factfinder. The Court in *Kremer* is favoring an administrative way of resolving a dispute but has not made any effort to describe what might be the criteria for a fair or proper alternative to the judicial system.

I would expect that in the next five to ten years we will see more developments along these lines. Whenever the Court has a choice between favoring state proceedings or favoring federal proceedings, it will tend to favor state proceedings. Whenever the Court has an opportunity to describe narrowly the due process rights of plaintiffs with state claims, it will do so. And whenever it has the opportunity to favor a system of dispute resolution other than formal adjudication, it will do so, but silently, without elaborating alternative standards for resolving disputes.