Lippert-Rasmussen, Kasper, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination*. New York: Oxford University Press, 2014. Pp xii+317. $65.00 (cloth).

Kasper Lippert-Rasmussen's book is the most exacting, and in some ways the most ambitious, of a recent wave of theoretical writings on discrimination and its wrongfulness. This is the third wave. The early 1970s saw a burst of scholarly interest in the acceptability of affirmative action and 'positive' discrimination. In the 1980s attention turned to questions about the proper scope of (then burgeoning) anti-discrimination law. With rare exceptions, however, writings in these earlier waves were sketchy on the question of when and why, apart from the law, regular 'negative' discrimination is objectionable. In the third wave, this more basic question is finally the main concern. Why the wait? Perhaps it is only now, fifty years on from the Civil Rights Act, that one can ask what is wrong with discrimination without one's automatically being taken to be what Lippert-Rasmussen calls a 'discrimination skeptic' (47).

Although he has little truck with the discrimination skeptics (47-53), Lippert-Rasmussen is not embarrassed to press the same awkward questions, or to admit the same uncertainties, that breed such skepticism. In Part I of the book he attempts a working analysis of the very idea of discrimination, making clear that even at this stage there are choices to be made about what to include and exclude, and what to emphasize and de-emphasize. In Part II he proceeds to examine three broad families of views about what is objectionable about objectionable discrimination, admitting that 'there is something to' these views even when he does not favor them (107), and conceding that even the view that he favors is not wholly satisfying (183). In Part III, he turns to a series of 'applied' topics, such as racial profiling and proportional representation, with a view to determining 'what we should do about discrimination' (193), but also with a view to illustrating and fine-tuning his positions from earlier in the

book. Even from this scant overview you can see one way in which the book is ambitious. It attempts the full journey from concept to policy. Inevitably the reader wishes, on occasions, to be covering less ground more slowly. For my own tastes, Part III arrived prematurely. I was thirsty for more development and defense of problematic claims made in Parts I and II, and I felt that the topics of Part III, while intrinsically interesting, only fragmentarily assuaged my thirst. I hope I may be forgiven, then, for focusing, here, mainly on the earlier Parts.

Part I has three chapters. Chapter 1 asks 'What is Discrimination?', while chapters 2 and 3 deal with 'Indirect Discrimination' and 'Statistical Discrimination' respectively. Lippert-Rasmussen begins work in chapter 1 with a nice analysis of 'discrimination in the generic sense' (14). He regards this as too thin a concept to work with. It boils down to choosiness. It is 'not what people complain about when they complain about discrimination' (22). He therefore adds an extra condition, which gives him the more specific concept of 'group discrimination' (28). This is the concept of discrimination that prevails in the rest of the book. Group discrimination is not analytically bad – Lippert-Rasmussen rules out some ways of understanding discrimination that would make it analytically bad – yet its badness is, so to speak, in the offing. It involves prejudice against, or contribution to the actual or potential relative disadvantage of, significant social groups. In this formulation I am glossing over many important details. Even without details, however, we might worry about the mode of analysis. Isn't Lippert-Rasmussen openly collapsing the pragmatics of contemporary discrimination-talk into the semantics? In the process, doesn't he stipulate what counts as discrimination for his purposes in a way that already skews us towards certain possible explanations of what is wrong with discrimination? He stops to defend his 'methodology' (47-9) but even the defense made me nervous, marked as it is by declarations about what an analysis of the concept of discrimination 'should be' (48). Why not just an

analysis of the concept of discrimination? And in favor of a thinner concept, might it not be that what is objectionable about objectionable discrimination (e.g. ignoring black neighbors) is best uncovered by first asking what is good about good discrimination (e.g. exhibiting great taste in friends)? Relegating good discrimination to outside the conceptual space of the book, it seems to me, risks losing some good argumentative footholds. And indeed the ethical discussions in Part II do, I think, suffer in places for the loss of such footholds.

Be that as it may, a different aspect of Lippert-Rasmussen's Part I analysis struck me as storing up problems for later in the book. He says that discrimination, even in the generic sense, is 'essentially comparative ... a matter of how an agent treats some people compared to others' (16). His own elaboration promptly shows that this is a misleading statement. He says: 'one cannot discriminate against someone unless there are others or receive (or who would receive) better treatment at one's hands' (16). The parenthetical alternative is of the essence. With few exceptions, anti-discrimination laws around the world do not require an actual comparator; an imaginary one will do. According to these laws, Crusoe may discriminate against Friday, by treating him worse than he would have treated a white man, had a white man shown up instead. It makes no difference that there is no white man. Is this a mistake in the law? It seems to me not. The law here reveals that our interest in comparison is diagnostic, a thought-experimental test for getting at something else. We ask how some possible white man would have been treated in Friday's place because, when we ask whether Crusoe engaged in racial discrimination against Friday, we are interested in whether Friday's being black (or foreign, non-white, etc.) figures in Crusoe's reasons for treating him as he does. Discussion of the discriminator's reasons is not absent from Lippert-Rasmussen's book – they constantly sneak back in, and I think in telling ways – but the supposed 'essentially comparative' feature,

by which it matters how others are treated, does more to shape his discussion, and in places, I think, to distort it.

Consider Lippert-Rasmussen's admirably careful and thoughtful treatment of 'indirect discrimination' in chapter 2. Having told us up front what indirect discrimination is not – it is not intentional discrimination (59-61) – Lippert-Rasmussen jumps straight to discussing the defining feature of indirect discrimination that lawyers call its 'disparate impact', which he labels the 'disadvantage' feature (61). But he jumps over another feature without which the 'disparate impact' feature makes little sense. In indirect discrimination cases we are still focusing, as ever, on the alleged discriminator's reasons for treating someone as he did. True, he did not act for reasons of race or sex (etc.), or in other words for reasons that are already marked out as objectionable. Rather, he acted for reasons that have a close contingent connection with reasons that are already marked out as objectionable. They are reasons such that people of different races or sexes (etc.) tend to be differentially advantaged by someone's acting for them. The discriminator gave rational weight to educational background or availability for evening work (say), when it so happens that black people are less likely than white to have the required background, or women are less likely than men to the have the required availability.

There is a genuinely comparative ingredient in this kind of discrimination. To find indirect discrimination one must find out about the relative positions of actual people. How is the required background or availability distributed across some specified population (known to lawyers as 'the pool') when that population is sorted according to race or sex (etc.)? But the discriminator, call him Crusoe, still need not do any comparing among actual people in order to be a discriminator. He may have only one candidate, call him Friday, a black man who lacks the required educational background. Subject to certain further conditions, Crusoe engages in indirect racial discrimination by rejecting Friday for the reason that Friday lacks the required

background, where the background is one that black people in a specified population (say: all those vulnerable to being stranded on desert islands) tend to lack more than white people.

The example shows that Lippert-Rasmussen is mistaken to treat it as axiomatic that indirect discrimination (unless it also happens to be direct discrimination) is not intentional discrimination (59-61). Indirect discrimination is no less intentional than direct discrimination. Both direct and indirect discriminators are identified by their reasons for action, which is to say by their intentions in acting. The difference is only that in one case race or sex (etc.) figures directly in their reasoning, but in the other it is only indirectly implicated (hence the name 'indirect discrimination'). Educational background or availability for evening work (etc.) counts as an objectionable reason for treating someone badly only if such background or availability is unevenly distributed across a population once that population is sorted according to race or sex (etc.). (The best treatment of these points known to me is Elisa Holmes, 'Anti-Discrimination Law Without Equality', *Modern Law Review* 68 [2005], 175-194.)

Lippert-Rasmussen's refusal to stick with 'discrimination in the generic sense', his sidelining of the 'reasons' feature of discrimination, and his inclusion of the 'essentially comparative' feature, all have some adverse effects on the otherwise superb discussions in Part II of the book. Part II again has three chapters, each focusing on a notable account of objectionable discrimination's objectionability. After quickly and convincingly dispatching a few non-starters that are often only 'cursorily mentioned' by their adherents and opponents alike (111), chapters 4 and 5 deal respectively with 'Mental-State-Based Accounts' and 'Objective-Meaning Accounts'. Chapter 6 brings us to the 'Harm-Based Accounts' to which Lippert-Rasmussen is more sympathetic. The three contenders are chosen not only for their prominence in third wave writings, but also for their claim or attempt to show what Lippert-Rasmussen calls the distinctive 'moral wrongness per se' (105) or 'intrinsic wrongness' (126) of

(group) discrimination. I found it hard to be sure how much was built into the idea of something's being 'intrinsically wrong' in Lippert-Rasmussen's sense. Officially the expression means 'wrong in virtue of properties that are true [*sic*] of discriminatory acts by definition' (104) – or roughly, 'wrong without exception'. That means more than just typically or commonly wrong, yet it still leaves open the possibility that some acts of discrimination may be justified (103), for a justification for wrongdoing is not the same as an exception to wrongdoing.

But does it also mean 'wrong in every place and at every time'? And does it entail 'wrong without exception not only thanks to an instrumental case for treating or regarding it as wrong without exception'? Lippert-Rasmussen seems to reply 'no' to the former question when he allows to pass without objection the idea that the 'objective meaning' in an 'objective meaning' account could be conventional or social meaning (132, 136). But he seems to reply 'yes' to the latter question when, in asking what class of actions should be used as the contrast class in assessing the objectionability of discriminatory actions, he contrasts what makes an 'intrinsic moral difference' with 'important instrumental reasons' for regarding two classes of actions differently (104). This strikes me as an unfortunate ruling. It means that the search for 'intrinsic wrongness' is unlikely to be successful because of the inadmissibility of arguments akin to those adduced by Rawls (in 'Two Concepts of Rules', *Philosophical Review* 64 [1955], 3–32) which defend the social suppression of exceptions to moral norms on instrumental grounds. Lippert-Rasmussen discovers, indeed, that the search for 'intrinsic wrongness' is futile (105, 183). But he does not draw the natural conclusion that, in 'structur[ing his] inquiry' around a quest for the intrinsic wrongness of discrimination (105), he is holding the accounts mentioned and discussed in chapters 4 and 5 up to a standard of success that they could never reasonably have been expected to meet. And indeed, when we get to chapter 6, he does not hold his own 'harm-based' account

up to the same standard of success. This is openly announced (155). But it also seems to me to have unannounced dialectical ramifications. For example, Lippert-Rasmussen's own account is treated as undamaged by counterexamples of much the same kind that are regarded as damaging when they are raised against alternative accounts (compare 173 with 108, 126, and 137).

Lippert-Rasmussen calls his harm-based account a 'desert-accommodating prioritarian' account (166). The 'desert-accommodating' part is a tweak (I thought a viciously circular tweak) that mainly serves to deprioritize the position of the discriminator herself in the ranking of harms for the purpose of the 'prioritarian' calculation. The 'prioritarian' calculation, meanwhile, is one that would have us treat any action that makes people worse off as 'worse ... the worse off they [already] are' (168). Prioritarianism has something specific to say about discrimination, thinks Lippert-Rasmussen, inasmuch as discrimination is 'differential treatment based on membership of socially salient groups' (168), where the criteria of social salience are such that discrimination against members of such groups is at odds with the prioritarian calculus. The words 'based on' here may make us think of the discriminator's reasons. But a lot more emphasis is placed, here as elsewhere in the book, on the word 'differential.' Discrimination is objectionable (when it is) mainly because those discriminated against come out of it badly as compared with others. True, in spite of the strange title of the book, Lippert-Rasmussen does not have a strictly egalitarian explanation of what is objectionable about discrimination. But his prioritarianism gives an explanation in the same neighborhood, one by which 'discrimination is – like the ideal of equality – essentially comparative' (184).

Lippert-Rasmussen uses indirect discrimination as a 'test case' for this explanation (177). The explanation passes the test. That is unsurprising, because (as we saw) there is a comparative aspect to indirect discrimination. A comparison of advantage across a relevantly sorted population or 'pool' is needed to establish

which reasons for action count as objectionable under the 'indirect discrimination' heading. That comparison, however, is not what makes indirect discrimination discriminatory. It is what makes it indirect. So it should not have pride of place, it seems to me, in an explanation of what is objectionable about objectionable discrimination in general, direct and indirect.

Lippert-Rasmussen may object that here I am distorting the way in which prioritarian comparison fits into his chapter 6 argument. His prioritarianism is 'welfarist-consequentialist' (176). What makes it consequentialist is that it is agent-neutral. It allows that 'one may ... harmfully discriminate against someone ... if that will prevent more cases of harmful discrimination' whether by oneself or by others (154). That much, as Lippert-Rasmussen observes (175), can also be accepted by those who think that discrimination is 'intrinsically' wrong: recall that they too can allow for justified discrimination, presumably including discrimination that is justified by the case for preventing further discrimination. So they too can be what Lippert-Rasmussen calls 'consequentialists'. What they seemingly cannot be, however, is what he calls 'welfarists'. They must find the badness of discrimination in the discriminatory act, whereas he, as a welfarist, finds it in that act's contribution to 'the (morally weighted) sum of well-being', where the relevant moral weighting is the prioritarian and desert-accommodating one (175). This still allows him to count constituents of discriminatory acts against those acts, so long as they are the right kind of constituents, namely welfare-reductions that are built into the act's ingredients *qua* discriminatory. But he is not limited to constituents. He can also count, by the same token, welfare-reductions that are consequences of discriminatory acts.

Thus in assessing Lippert-Rasmussen's 'desert-prioritarian-welfarist-consequentialist' explanation of discrimination's objectionability we should be looking not only at counter-prioritarian constituents of objectionably discriminatory acts but also at their counter-prioritarian consequences. Some

discrimination may be objectionable because of 'harmful effects' while others because of 'kinds of harm that being discriminated against may be thought to constitute' (171) – and some perhaps both. We are always looking, in short, for what lawyers call a disparate impact. It is simply that sometimes the disparate impact is bound up with the discriminatory treatment, whereas on other occasions it is a further (consequential) impact.

This highly imaginative duality in his explanation matters for Lippert-Rasmussen's attempt to resist the objection that his explanation of what is wrong with discrimination 'does not ... capture what is distinctively wrong with discrimination' (170-1). Many acts that are not discriminatory have counter-prioritarian consequences and are objectionable for that reason. What's so special about discrimination that it merits separate billing as a wrong? Lippert-Rasmussen grasps the nettle here and says: sometimes, nothing (171). But he still wants to say that there are some cases in which there is something special about discrimination, and these are the cases in which the discrimination has the a constitutive counter-prioritarian feature, its harm 'associated only [or specially] with discrimination' (171).

Personally I did not find this dénouement very satisfying. I longed for more to be said about many aspects of it, and found far too few of those aspects reprised in Part III. I still found comparison too much in the foreground and reasons too much in the background. I still thought that some of the moral argument had been fixed or skewed by the Part I stipulations. Yet I was both charmed and disarmed by the fact that Lippert-Rasmussen was himself so openly dissatisfied by the progress he had made. It led me to think how, for a philosopher, failing to find what one originally sought can itself be a kind of triumph, a necessary lesson in the limits of philosophy. And that was only one of many fine lessons that Lippert-Rasmussen taught me.

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