Racial Profiling Who is the Executioner and Does He Have a Face?

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Abstract

The debate surrounding racial profiling—the use of race as a heuristic for determining the probability of criminality—has reemerged with the War on Terror. Up to this point, the debate has concentrated on legal or political analyses to the exclusion of philosophical ethics. This Article begins to fill that gap by presenting some ethical questions to be used in the analysis of racial profiling. After an overview of the legal regime and justifications given for the use of racial profiling, the Article explores how Emmanuel Levinas' ethics of responsibility can help us understand the ethical structure of racial profiling, see the basic ethical problems within this structure, and give us a new ethical viewpoint on racial profiling. On one hand, racial profiling in Levinas seems to be “impossible” in that it cannot give us any information about the Other and can only reduce the other person to an inhuman object; “unethical,” since it reduces the other to an object and makes an ethical relationship with him impossible; and “unjust,” in that it ignores our duty towards the other. However, the existence of a third party who might be harmed by terrorists changes the dynamic, adding an additional Other for whom, Levinas says, we have an ethical responsibility. The balance of these seemingly contradictory imperatives is the difficult task Levinas leaves us with in our analysis of the ethics of racial profiling; a task that sheds light on the ramifications of racial profiling and its use for state protection. These thoughts are highly important in the new period of Obama Administration.

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Introduction

One week after the September 11th terrorist attacks the U.S. Congress passed the Authorization for Use of Military Force Joint Resolution, which authorized the president to use “all necessary and appropriate force” against those associated with the attacks. The resulting “War on Terror” has “challenged the traditional rhetoric and contemporary reality concerning the Bill of Rights.” In particular, the U.S. has revisited the debate over racial profiling—the practice of using race in assessing the probability a person is engaged in criminal behavior. Some scholars altogether reject the use of racial profiling, some think it may be legitimate under certain circumstances and some think it is an inevitable tool in counterterrorist activity.

So far, the debate over racial profiling has occurred primarily in the legal and political spheres. Pure ethical discourse has been limited. This paper explores how Emmanuel Levinas’ notion of the ethics of responsibility sheds light on the ramifications of racial profiling and its use for state protection—thoughts which can be useful in the new period of Obama Administration.

Emmanuel Levinas, one of the most influential philosophers of the 20th century, is famous for viewing ethics as “first philosophy”—meaning that ethical relations are at the base of philosophy and metaphysics. This makes Levinas’ writings a natural place to begin exploring the ethical point of view of racial

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3 See, e.g., Fredrick Schauer, Profiles, Probabilities, and Stereotypes (Harvard University Press) (2003) (arguing that effective profiling must consist of dozens of elements, so including “Middle Eastern” should mean adding it to a long list of others factors, not making it the only or the decisive factor). See also Alan Dershowitz, Preemption: A Knife that Cuts Both Ways (Norton, W.W. & Co., Inc.) (2006) (arguing that in the age of terror, when there is a shift from responding to past events to preventing future harms, there is a need for such devices as profiling and preventative detention).
4 See, e.g., Daniel Pipes, The Enemy Within and the Need to Profiling, N.Y. Post, Jan. 24, 2003 (“[E]nhanced scrutiny of Muslims makes good sense, for several reasons…. Singling out a class of persons by their religion feels wrong, if not downright un-American, prompting the question: Even if useful, should such scrutiny be permitted? If Americans want to protect themselves from Islamist terrorism, they must temporarily give higher priority to security concerns than to civil-libertarian sensitivities.”). See also Daniel Pipes, Does the Police Department Profile? Should It? N.Y. Sun, June 13, 2006 (arguing in favor of a bill proposed by Dov Hikind in the New York State Assembly that authorizes law enforcement “to consider race and ethnicity” in counterterrorism efforts).
5 There has also been a move to look at natural science explanations and solutions for use in the War on Terror. Traditionally, terrorism was studied under the umbrella of the social sciences. The interest of the natural sciences was invoked, presumably, because the prospect of terrorists’ use of mass destruction weapons became undeniable. See Yuval Wolf & Ofir Frankel, Terrorism: Toward an Overarched Account and Prevention with a Special Reference to Pendulum Interplay Between Both Parties, 12 Aggression and Violent Behavior 259, 260 (2007).
6 One of the first things President Barack Obama did when he was sworn as President was to close detention facilities at Guantánamo. See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).
profiling. I argue that while a superficial view of Levinas’ ethics seems to indicate problems with racial profiling because of the impossibility of knowing and understanding the Other profiled, the ethical imperative of protecting third parties makes the analysis far more nuanced. This analysis, without favoring racial profiling, help us understand what happens between two people (myself and the Other) in the process of racial profiling thereby providing us with a wider and better perspective on the whole issue.

Levinas’ philosophy focuses on the significance of the other person. In his famous text, *Totality and Infinity*, Levinas developed the idea that the attempt of the self to understand the other is an act of reduction, violence and “totalization.” Levinas distinguishes between the capital-O “Other,” which refers to the, irreducible and infinite other, which is unique to Levinas’ philosophy, and the lowercase-o “other,” meaning another person as expressed in everyday language. According to Levinas, the Other always evades our understanding. Levinas’ main claim is that we are infinitely responsible for the Other. This responsibility manifests itself in the ultimate ethical demand ‘Thou shall not kill.’

Since racial profiling involves reducing the infinite Other to a finite profile, one might assume Levinas would have seen it as improper. I postulate that racial profiling under Levinas’ ethics of responsibility is “impossible,” “unethical,” and “unjust;” each of these referring to specific ethical constructs described below. Contemporary practice may not only violate established legal principles of the Bill of Rights, it is exclusionary to a moral philosophy, like Levinas’ ethics, that focuses on the Other.

Part I of this Article describes the origins of the practice of racial profiling. Part II describes the tension between this practice and constitutional values. Part III deals with some important differences between the War on Drugs and the War on Terror in legal philosophy that might justify the practice in counterterrorism regardless of wide condemnation of its use in the War on Drugs. Part IV explores racial profiling in the War on Terror in the context of Levinas’ ethics of responsibility. Part V concludes.

I. **Racial Profiling**

Racial profiling is not only a complex legal issue, but also one of the most emotional issues facing law enforcement today. The exact definition of racial profiling remains open for debate. Some definitions embody moral assessment or

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8 See infra notes 117-118.
use legal and constitutional terms. The use of the term “profiling” is problematic in itself, as it has moved in common parlance from a description of professional law-enforcement practice to a characterization of one of the worst forms of police abuse. This stems in large part from the original use of the term to describe the police “practice of stopping a disproportionate number of male African-American drivers on the assumption that they have a heightened likelihood of being involved in criminal activity.”

For the purposes of this Article, I use the definition of racial profiling given in a report submitted to the Department of Justice: Racial profiling is “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been, engaged in criminal activity.”

The use of proxies for criminal behavior, including racial profiling, is as old as the existence of police forces. Police forces, like any agency charged with finding wrongdoing, must use some sort of heuristic device to determine whether a person is likely to be breaking the law. "[T]he actuarial permeates the field of criminal law and its enforcement, from the use of the IRS discriminant Index Function to predict potential tax evasion … to the use of risk-assessment instruments to determine pretrial detention, length of criminal sentences, prison classification and parole eligibility." It is when the criterion used is race that the legal ramifications of profiling become problematic.

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12 See, e.g., Paul H. Zoubek & Ronald Susswein, Symposium: On the Toll Road to Reform: One State’s Effort to Put the Brakes on Racial Profiling, 3 RUTGERS RACE & L. REV. 223, 224 (2001) (contending that racial profiling is a form of prejudice in the literal sense that it entails pre-judging the likelihood that a person is a criminal on the basis of skin color).
13 See, e.g., DARIN D. FREDRIKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION, at ix (Charles C Thomas Publisher, Ltd.) (2002) (defining racial profiling as the use by law enforcement officials of on race, skin color or ethnicity as an indication of criminality, reasonable suspicion or probable cause).
14 See HARRIS, supra note 2, at 16 (providing rationales behind the legitimate criminal profiling).
15 SCHAUER, supra note 3, at 159.
16 BLACK’S LAW DICTIONARY 1286 (8th ed. 2004). On the origin of racial profiling, see FREDRIKSON & SILJANDER, supra note 13, at 21-22 (describing the origin of the drug courier profile) and HEUMANN & CASSAK, supra note 11, at 2 (explaining that the term “racial profiling” arose in the mid-1990s to describe specific types of police practices, stopping minority motorists on the highway to search for drugs, although those practices actually began more than a decade before that).
18 Daryl L. Hunter, Historical Profiling (Racial Profiling), CITIZENS FOR A FREEER AMERICA, Apr. 3, 2008, http://www.free-press.biz/usa/racial-profiling.htm (stating, dramatically, “All of us in society have a personal history, and we draw from that personal history to make judgments for our future actions and decisions. Policemen during their careers have learned that a disproportionate number of lawbreakers belong to minority groups and rightly scrutinize these groups more intently than others.”).
19 HARCOURT, supra note 2, at 2.
Modern use of racial profiling is typified by its use in the War on Drugs in the 1980s. Police used “drug courier profiles” and carried out pretext stops, searches and seizures, at least partially for reasons other than the ex-post justification for these actions. A pretext investigatory stop occurs when a police officer uses a traffic violation to stop a vehicle to search for drugs without the objective cause necessary for a drug investigation stop. In fact, the large number of African-American male drivers stopped because of the presumption that they engage in drugs and weapons activities have been said to be only guilty of “driving while black.”

The events of September 11th led to terrorist profiling similar to drug courier profiling in form and purpose. In 2003, the Transportation Security Administration began profiling passengers through the Screening of Passengers by Observation Techniques (“SPOT”) system, which now operates in twelve U.S. airports. SPOT and other terrorist profiling techniques are supposed to only use behavioral profiling; Department of Transportation guidelines issued after September 11th forbid airline personnel from relying on “generalized stereotypes or attitudes or beliefs about the propensity of members of any racial, ethnic, religious, or national origin group to engage in unlawful activity.” Regardless of this directive, Muslims and Middle Eastern people have felt SPOT and other behavioral profiling systems unfairly target them.

Commentators quickly made analogies between the racial profiling analogies of War on Terror and the War on Drugs. Sameer Ashar wrote in 2002 that “[t]he government has used the imperatives of the ‘War on Terror’ to justify unchecked law enforcement practices, in the same way that the ‘War on Drugs’ was used to justify the arrest and imprisonment of a disproportionate number of African-American and

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21 Craig M. Glantz, Supreme Court Review: ‘Could’ This be the End of Fourth Amendment Protections for Motorists?, 87 J. CRIM. L. & CRIMINOLOGY 864, 865 (1997).
23 FREDICKSON & SILJANDER, supra note 13, at 21-22; HEUMANN & CASSAK, supra note 11, at 16.
25 See HEUMANN & CASSAK supra note 11, at 162-64.
Latino men.”28 As Heumann and Cassak put it, “‘Flying While Arab’ [has] threatened to replace ‘Driving While Black.’”29

A thorough understanding of the validity of this comparison, and its consequences, requires looking into the legal ramifications of racial profiling. The next Part begins this task.

II. Racial Profiling and the Law

Any legal analysis of the War on Terror is necessarily complex because of the delicate balance between the right of a state to protect itself against threats to its existence, independence and its right to provide for the security of its citizens, on the one hand;30 and the basic human rights and dignities present in the legal structure of democracies, on the other hand.31 Yet governments find it hard to justify impinging on the basic rights and undergirding national power simply by invoking a nebulous threat.

The terminology used in describing counterterrorist activities as a War on Terror presumes a need for exceptional measures.32 The Bush administration insisted that “everything changed” after September 11th and hence invoked the “preventive paradigm” freeing the state to use force not merely reactively but proactively—to defend against terrorist attacks before they are launched.33 The Bush administration assumption is that the War is not one against an identifiable country but rather a

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29 HEUMANN & CASSAK, supra note 11, at 4. See also David Harris, Flying While Arab: Lessons From the Racial Profiling Controversy, CIVIL RIGHTS J., Winter 2002, at 8-13 (claiming that racial profiling has undergone rehabilitation).
32 Cf. Zoubek & Susswein, supra note 12, at 229-30 (explaining that states often use to describe terrorists as actors not adhering to the rules and traditions of any established national armed forces).
conflict with groups and individuals around the world, who may be able to recruit new zealots for years and years to come. In light of this, the Bush administration has claimed that since Geneva Conventions apply only to wars between nations and internal civil wars, traditionally recognized rules of war are not applicable. Such an undefined, nebulous “War” presents new problems in American law. For example, while the Supreme Court recognizes that detention may last no longer than active hostilities, the duration of the relevant conflict is not at all determinable. In addition, the ability of the Court to identify “enemy combatants” is hampered by the fact that the soldiers of the “enemy” do not comprise a particular state.

These general problems, inherent in any discussion of state security, are accompanied by problems specific to the issue of racial profiling. Problems are bound to arise when enforcement authorities address crimes committed by a group of individuals, many of whom share racial or ethnic characteristics. While it is common and acceptable to engage in criminal profiling, which is a well known practice in law enforcement where authorities use characteristics (physical, behavioral, or psychological) associated with a particular crime, or develop a profile of someone likely to engage in illegal behavior. The assumption is that there is a higher probability that someone matching the profile be engaged in crime. A unique complexity arises, since racial profiling is not the same as determining “case probability,” the classic and (generally considered) legitimate practice of criminal profiling. Enforcement authorities use case probability to decide if a person matches a specific description of a particular suspect, but in racial profiling race or ethnicity are not used in this manner and are instead used in a discriminatory way. On the other hand, if the evidence regarding the racial or ethnic characteristic of the individuals is well established, it might create a case for “class probability,” in which an individual is assumed to possess features of the group to which she belongs. For example, "guilt by association" permits the government to incarcerate persons based

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34 See SMITH, McCALL & MCCLUSKEY, supra note 1, at 141.
37 Id. at 516.
38 See FREDICKSON & SILJANDER, supra note 13, at 27 (distinguishing between profiling of individual and profiling of group); see also R. Richard Banks, Racial Profiling and Antiterrorism Efforts, 89 CORNELL L. REV. 1201, 1217 (2004).
39 RAMIREZ, McDEVITT & FARRELL, supra note 17, at 3. See Banks, supra note 38, at 1205-1206 (discussing racial profiling in antiterrorism efforts as an example of the indeterminacy of the notion of racial discrimination).
40 See CALLAHAN & ANDERSON, supra note 20 (describing “case probability” as situations in which we comprehend some factors relevant to a particular event, but not all such factors). Some see race as a legitimate consideration in such situations, see United States v. Travis, 62 F.3d. 170, 173 (6th Cir. 1995) (“Obviously race or ethnic background may become a legitimate consideration when investigators have information on this subject about a particular suspect.”).
41 See FREDICKSON & SILJANDER, supra note 13, at 27; Banks, supra note 398, at 1205-06 (distinguishing between profiling of individual and profiling of group).
42 “Class probability” refers to situations in which we know enough about a class of events to describe it using statistics, but nothing about a particular event other than the fact that it belongs to the class in question. See CALLAHAN & ANDERSON, supra note 20.
not on their involvement in planning future crimes, but on the basis of their affiliation or association with others who have engaged in illegal conduct.\textsuperscript{43}

On its face, racial profiling challenges a number of constitutional guarantees. Most relevant for the current discussion is the Fourth Amendment right of protection against unreasonable searches and seizures. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{44}

The Fourth Amendment seeks to prevent arbitrariness\textsuperscript{45} and ensure that neutral judicial officers examine evidence purporting to justify arrests when an individual is deprived of his or her liberty.\textsuperscript{46} The Supreme Court made this objective evident in \textit{Brown v. Texas},\textsuperscript{47} stating that a central concern in balancing the competing considerations embodied in the Fourth Amendment is

\begin{quote}
to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field …. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.\textsuperscript{48}
\end{quote}

The general constitutional standard for search and seizure is “probable cause.”\textsuperscript{49} “When an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.”\textsuperscript{50} However, not all stops require “probable cause.” Only “reasonable suspicion” is needed for the more limited police action known as “stop and frisk,” which is a carefully limited search of outer clothing.\textsuperscript{51} The Supreme Court held in \textit{Terry v. Ohio}\textsuperscript{52} that whenever “a reasonably

\begin{footnotes}
\footnotetext{43}{Cole, \textit{supra} note 33, at 247.}
\footnotetext{44}{U.S. CONST. amen. IV. The amendment has been incorporated to the states through the due process clause of the Fourteenth Amendment. \textit{See} Mapp v. Ohio, 367 U.S. 643 (1961).}
\footnotetext{46}{\textit{Id.} at 51.}
\footnotetext{47}{443 U.S. 47 (1979).}
\footnotetext{48}{\textit{Id.} at 51.}
\footnotetext{49}{U.S. CONST. amen. IV., \textit{supra} note 44.}
\footnotetext{50}{\textit{See} Virginia v. Moore, 128 S. Ct. 1598, 1604 (2008).}
\footnotetext{51}{\textit{See}, \textit{e.g.} Florida v. J.L., 529 U.S. 266, 270 (2000).}
\footnotetext{52}{\textit{Terry v. Ohio}, 392 U.S. 1 (1968).}
\end{footnotes}
prudent police officer” believes that his safety or that of others is endangered, he has a right to “stop and frisk” a person who is behaving suspiciously even without probable cause to make an arrest.\textsuperscript{53} According to \textit{Terry}, an officer must have reasonable suspicion based on an objective assessment of the facts at the time of the stop (an objective standard for testing the legality of the stop) and must only engage in a search reasonably related to the facts and circumstances which initially justified the stop.\textsuperscript{54}

While there is an abundance of case law on the Fourth Amendment generally, my purpose here is to focus on racial profiling through the lens of the War on Drugs and the War on Terror. Thus, in the next two Sections I explore cases dealing with Fourth Amendment jurisprudence in the context of the War on Drugs and the War on Terror.

A. Racial Profiling and the War on Drugs

The 1996 Supreme Court case \textit{Whren v. United States} explored the use of traffic pretext stops used in the War on Drugs to search for drug couriers. The \textit{Whren} Court held the legality of stopping a vehicle is not dependent on the police officer’s subjective motive; as long as an objective cause for stopping exists, the action is legal.\textsuperscript{55} Thus a police officer who stops a vehicle running a red light, even if the stop is truly based on insidious racial bias, does not violate the Fourth Amendment. “Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”\textsuperscript{56}

The \textit{Whren} decision elicited widespread criticism. Many claimed that by removing the subjective motivation of the officer from the Fourth Amendment calculus, the Court validated one of the popular uses of racial profiling—the pretext stop—and thus significantly reduced the ability of defendants to contest it and to prove that consideration of race played a part in the decision to stop and arrest.\textsuperscript{57} Later cases lent credence to this interpretation. In \textit{Atwater v. City of Lago Vista},\textsuperscript{58} the Supreme Court, relying on \textit{Whren}, observed that although the Fourth Amendment generally requires a balancing of individual and governmental interests, governmental interest will often come out on top of individual rights where an arrest is based on probable cause.\textsuperscript{59} Thus, enforcement authorities are granted near unlimited discretion in a way that facilitates arbitrary intrusions. Justice O’Connor, in dissent, noted that “the majority gives officers unfettered discretion to choose that course [search and arrest] without articulating a single reason why such action is appropriate. Such unbounded discretion carries with it grave potential for abuse.”\textsuperscript{60}

\textsuperscript{53} \textit{Id.} at 20-27.
\textsuperscript{54} Pulliam, \textit{supra} note 45, at 494-96.
\textsuperscript{55} \textit{Whren} v. United States, 517 U.S. 806 (1996).
\textsuperscript{56} \textit{Id.} at 813.
\textsuperscript{58} \textit{Atwater} v. \textit{City of Lago Vista}, 532 U.S. 318 (2001).
\textsuperscript{59} \textit{Id.} at 325.
\textsuperscript{60} \textit{Id.} at 371-72 (emphasis added) (footnotes omitted).
It is important to note that while most courts that have confronted the issue of pretext stops have authorized police to use race in making decisions to question, stop, or detain persons so long as doing so is reasonably related to efficient law enforcement, political factors have militated against using racial profiling. In June 1999 President Bill Clinton stated “racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop.” Around this time, police departments throughout the country began to collect data on all traffic stops. New Jersey was the first to initiate an examination of the practice. In a report issued after the examination, the Attorney General of New Jersey adopted a bright-line rule that state police members are not permitted to consider a person's race, ethnicity, or national origin to any extent in making law enforcement decisions. Under the New Jersey approach, an instance of racial profiling is considered to have taken place if a motorist's race or ethnicity was taken into account and in any way contributed to the officer's decision to act or refrain from acting.

B. Racial Profiling and the War on Terror

As a response to September 11th, the Bush Administration undertook a variety of measures it asserted were necessary to combat the threat of terrorism, including fingerprinting 82,000 Arab and Muslim immigrant men, interviewing 8000 Arab and Muslim men through the Federal Bureau of Investigations, and detaining over 5000 foreigners, most of whom were Arabs and Muslims. Like in the War on Drugs, “the government adopted an aggressive strategy of arrest and prosecution on 'pretextual' minor charges – such as immigration violations, credit card fraud or false statements – or on no charge at all, as 'material witnesses, when it suspected them as terrorist ties but lack the evidence to try them for terrorism."

Many of the techniques used in the War on Terror have been criticized for “running roughshod over the principles of the Bill of Rights.” Particularly implicated have been the First Amendment’s implied freedom of association, the Fourth Amendment requirement of probable cause for capture and detention, the

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63 See Zoubek & Susswein, supra note 12, at 229.
66 SMITH, MCCALL & MCCUSKEY, supra note 1, at 125.
68 U.S. CONST. amend. IV; Rasul v. Bush, 542 U.S. 466, 561(2004) (holding U.S. courts have jurisdiction to consider challenges to the legality of the detentions since United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base). But see SMITH, MCCALL & MCCUSKEY, supra note 1, at 144 (stating it was reported by Human Rights Watch, many high-
Fifth Amendment requirement that the guilt must attached to a person rather than a group and the Eighth Amendment protection against cruel and unusual punishment. The Supreme Court has emphasized the importance, even in wartime, of individual rights:

[I]t is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Supreme Court justices differ on what exactly should and should not be allowed in the War on Terror. Justice Scalia has stated during wartime “the [legal] protections [for individuals] will be ratcheted right down to the constitutional minimum.” This fear for established principles is best demonstrated by Justice Stevens words in his dissenting opinion in the Padilla case:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Academics have also entered the debate. To accommodate beliefs such as Justice Scalia’s, Bruce Ackerman has argued that a constitutional framework for a temporary state of emergency be designed, in order to enable the government to discharge the "reassurance function." He points out that the current War on Terror is fraught with anti-Islamic and anti-Arab prejudices that could turn very ugly under emergency conditions.
Therefore, he aims to design a constitutional framework for a temporary state of emergency that enables government to discharge the reassurance function without doing long-term damage to individual rights. \footnote{Id. at 1037.} Others have stated that American approach to War on Terror is nothing new but is instead an extension of general crime fighting techniques. \footnote{James Forman Jr., Exporting Harshness: How the War on Crime Has Made the War on Terror Possible GEORGETOWN LAW FACULTY WORKING PAPERS paper 78, at 2 (2008) available at http://lsr.nellco.org/georgetown/fwps/papers/78.}

### III. Justifications for Racial Profiling in the War of Terror

This Part explores important differences between the War on Drugs and the War on Terror, inquiring into whether these variations justify the use of racial profiling and infringements upon the Bill of Rights. The two differ under analyses of legality, proportionality, and discretion.

#### A. The Legality of Purpose and Relevance of Considerations

The analysis of racial profiling in the War on Terror and the War on Drugs differ under the principles of legality of purposes and relevance of considerations. The principle of legality prescribes that an authority possesses only such power as has been vested in it by statute; an agent is constrained to adhere to the terms of the power delegation. \footnote{See BRIAN THOMPSON, TEXTBOOK ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 341 (Oxford University Press, 1993).} Pretext stops might be considered illegitimate on this ground since police create classifications not authorized by law. Since traffic laws aim to maintain safety on the roads, policemen should not be allowed to exercise discretion in enforcing these laws for a purpose (finding drugs), which is not even implied in the relevant law. The unauthorized classification leads to an improper purpose underlying the police act, making it illegitimate. \footnote{It is unlawful to use a discretionary power to achieve a purpose other than that for which the power was conferred. See MICHAEL ALLEN, BRIAN THOMPSON & BERNADETTE WALSH, CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 367 (Oxford University Press, 1990) (discussing the doctrine of proper purpose as part of the legality principle).} The legality inquiry is different in counterterrorist activity. Here, enforcement agencies use their authority to achieve the goals of the enabling laws, namely to promote homeland security and to detect and prosecute crimes against the United States. \footnote{See, e.g., 28 U.S.C. § 533 (1966) (the investigative authority of the FBI); 50 U.S.C. § 401 (1947) (the declaration of policy regarding the CIA).} While the authority vested in enforcement agencies by these acts may be controversial, \footnote{See, e.g., Peter Siggins, Racial Profiling in the Age of Terrorism, MARKKULA CENTER FOR APPLIED ETHICS, Mar. 12, 2002, http://www.scu.edu/ethics/publications/ethicalperspectives/profiling.html. (criticizing Section 412 of USA PATRIOT Act, which permits the Attorney General of the United States to detain aliens he certifies as threats to national security for up to seven days without bringing charges).} there is no doubt that their purpose is to stop terrorists.
A similar argument can be made in regard to the relevance of considerations. “Relevance” defines the factors which may or may not be considered in making decisions. Relevant considerations are considerations that the law requires be taken into account and, conversely, irrelevant considerations are considerations outside the object and purpose of the statute. While race, ethnicity, or nationality are irrelevant to traffic enforcement, those who argue in favor of racial profiling say that these factors are by definition relevant to counterterrorism in the aftermath of the attacks, since the hijackers were Muslims born in Middle Eastern countries. Although one might argue that while in the case of the War on Drugs this factor should be rejected, to others it may be one factor among many in a decision to stop someone in the context of the fight against terrorism.

B. Proportionality

The principle of proportionality is at the heart of the European legal order and is increasingly recognized as a key component of the rule of law in countries around the world. By providing a systematic approach to the judicial review of measures taken by public authorities, it requires that individuals affected by decisions do not bear a burden unnecessary to the end being pursued. Proportionality analysis consists of three tests: “suitability,” “necessity,” and “proportionality in the strict sense.” While the practice of pretext stops is generally disproportional, some important distinctions indicate that the balance might be different in certain situations of counterterrorism.

The first subtest of proportionality—suitability—requires that administrative authorities employ only those means appropriate to accomplish the relevant objective when enforcing the law. The suitability of a measure must be decided according to

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83 This is true regarding drug couriers, since empirical evidence discredits the argument that more minority drivers are found with contraband. See RAMIREZ, McDEVITT & FARRELL, supra note 17, at 10.
84 HEUMANN & CASSAK, supra note 11, at 162-64.
85 Compare this to the Supreme Court’s approach regarding the search for illegal aliens on the American-Mexican border—the Supreme Court ruled that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.” United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975). See also United States v. Martinez-Fuerte, 428 U.S. 543, 563-64 (1976).
86 DAVID BEATTY, THE ULTIMATE RULE OF LAW 159 (Oxford University Press, 2004); Michael Fordham & Thomas de la Mare, Identifying the Principle of Proportionality, in UNDERSTANDING HUMAN RIGHTS PRINCIPLES 28 (Jeffrey Jowell & Jonathan Coopered eds., 2001).
objective standards and not according to the subjective judgment of the administrating authority.\textsuperscript{89} When the aim is enforcement, no chosen course of action can completely achieve the aim since complete enforcement is a myth.\textsuperscript{90} Thus the rational connection between the means and the aim depends, to a large extent, on the results.\textsuperscript{91} The uncertainty is significant in the case of pretext stop since there is almost no information about the impact that these police tactics have on innocent citizens.\textsuperscript{92} However, evidence from a variety of contexts proves that racial profiling is neither an efficient nor an effective tool for fighting crime.\textsuperscript{93} Hence the first sub-test of proportionality, which is generally met in cases, is not satisfied in the case of racial profiling as used in the War on Drugs.

The second sub-test—necessity—requires that there be no less restrictive measures available that would also achieve the goal. Racial profiling is not only an unnecessary measure, as its usefulness is far outweighed by intelligence gathering and analysis techniques, but it can in fact damage enforcement ability; focusing on those who "look suspicious" takes police attention away from those who “act suspicious.”\textsuperscript{94} Profiling is by definition over-inclusive. When race is used as a proxy for criminality or dangerousness, profiles based on race will always sweep too widely since a relatively few of any race are criminals.\textsuperscript{95} Thus, focusing on the appearance is inefficient and clearly not the least restrictive means to furthering law enforcement.\textsuperscript{96}

The third sub-test—legality in the strict sense—requires a proper balance between the injury to the individual and the gain to the community. Authorities must avoid acting in a way that puts severe burden on the life of an individual.\textsuperscript{97} The real cost of pretext stops tactics is their profound impact on innocent people; racial profiling practices burden innocent individuals of minority groups to a much greater extent than other innocent persons.\textsuperscript{98} Furthermore, racial profiling carries with it costs that go beyond psychological hardship and damage, such as impact on the mobility of those subjected to it.\textsuperscript{99} Beyond the cost to the individual, racial profiling has costs to society. It corrodes the legitimacy of the rule of law and the entire legal system including the courts,\textsuperscript{100} it distorts criminal records and sentencing,\textsuperscript{101} and it impedes community policing.\textsuperscript{102} Thus, in the absence of crucial evidence that

\textsuperscript{90} Cf. id. at 26 ("[T]he partial realization of the desired end, however, is considered enough.”).
\textsuperscript{91} See EmilioU, supra note 89, at 26 (stating the German Constitutional Court, for example, considers means suitable to attain a given objective “when the desired result can be furthered with its help.”).
\textsuperscript{92} See Harris, supra note 14, at 87-88.
\textsuperscript{93} See Harris, supra note 14, at 79-84 (elaborating on the statistics).
\textsuperscript{94} Harris, supra note 2, at 12.
\textsuperscript{95} Id. at 106.
\textsuperscript{96} Cf. Siggins, supra note 81 (“If ethnic profiling of middle eastern men is enough to warrant disparate treatment, we accept that all or most middle eastern men have a proclivity for terrorism...”).
\textsuperscript{97} EmilioU, supra note 89, at 34.
\textsuperscript{98} Cf. Banks, supra note 39, at 1217.
\textsuperscript{99} Harris, supra note 2, at 102.
\textsuperscript{100} Id. at 117-24.
\textsuperscript{101} Id. at 124-26.
\textsuperscript{102} Id. at 126-28.
African-Americans are more inclined to carry drugs, the infringement upon the presumption of their innocence definitely exceeds the social benefit of the stops.\footnote{103 \textit{Cf. Callahan} \& \textit{Anderson}, \textit{supra} note 20 (“It should be obvious that there’s something nutty about a legal system that assumes suspects in murder, robbery and rape cases are innocent until a trial proves otherwise, but assumes that a landscaper carrying some cash is guilty of trafficking.”).}

The principle of proportionality does not give us such a clear answer as to whether racial profiling should be acceptable in the War on Terror. Since there is a correlation between the religion and origin of the potential terrorists,\footnote{104 \textit{Heumann} \& \textit{Cassak}, \textit{supra} note 11, at 162-64.} many argue that using racial profiling is rational. Though anti-terrorism efforts burden innocent Arabs and Muslims to a much greater extent than other innocent persons,\footnote{105 Banks, \textit{supra} note 39, at 1217.} they argue proportionality is a relational principle and cannot be viewed in a vacuum.\footnote{106 Nick Fotion, \textit{Proportionality, in Moral Constraints on War} 91 (Bruno Coppieters \& Nick Fotion eds., 2002).} In addition, some writers have pointed out that terrorist activity results in mass murder, which is higher on the scale of immediate damage than drug trafficking.\footnote{107 See, \textit{e.g.}, Sophia E. Harris, \textit{Seeking Out Terrorists: Will Racial Profiling Do?} 36 UWLA L. REV. 249, 252 (2005).} This influences the analysis under the third test, regarding the demand for proper balance between the injury to the individual and the gain to the community. However, this analysis does not forestall the possibility that there are less restrictive measures that might work.

C. Discretion

Racial profiling in the War on Terror and the War on Drugs also differ in the amount of discretion given to law enforcement officials. Large amounts of discretion can lead to “selective enforcement,” which is intertwined with the phenomenon of racial profiling. "Selective enforcement" applies to a situation in which a fair and impartial law is applied, administered and enforced only against certain individuals or groups or through different enforcement policies depending upon the identity or affiliation of the person or entity involved.\footnote{108 Michal Tamir, \textit{Public Law as a Whole and Normative Duality: Reclaiming Administrative Insights in Enforcement Review}, 12 TEX. J. ON C.L. \& C.R. 43, 76-77 (2006).} Selective enforcement is not the opposite of complete enforcement since complete enforcement is neither feasible\footnote{109 See Frank W. Miller, \textit{Prosecution: the Decision to Charge a Suspect with a Crime} 151 (Boston: Little, Brown 1969) (“Full enforcement of the criminal law in a sense that every violator of every statute should be apprehended, charged, convicted and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable ideal.”).} nor desirable\footnote{110 According to the economic analysis of criminal law, the optimal rate of enforcement lies at the point where the social cost from extra enforcement equals the social utility from diminishing criminal activity. \textit{See} Isaac Ehrlich, \textit{The Economic Approach to Crime – A Preliminary Assessment, in Readings in the Economics of Law and Regulation} 297-312 (A.I. Ogus \& C.G. Veljanovskieds eds., Oxford University Press, 1984); A. Mitchell Polinsky \& Steven Shavell, \textit{The Economic Theory of Public Enforcement of Law}, 38 J. ECON. LITERATURE 45 (2000).} given the scarcity of resources.\footnote{111} It is also not necessarily identical

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\item[103] \textit{Cf. Callahan} \& \textit{Anderson}, \textit{supra} note 20 (“It should be obvious that there’s something nutty about a legal system that assumes suspects in murder, robbery and rape cases are innocent until a trial proves otherwise, but assumes that a landscaper carrying some cash is guilty of trafficking.”).
\item[104] \textit{Heumann} \& \textit{Cassak}, \textit{supra} note 11, at 162-64.
\item[105] Banks, \textit{supra} note 39, at 1217.
\item[106] Nick Fotion, \textit{Proportionality, in Moral Constraints on War} 91 (Bruno Coppieters \& Nick Fotion eds., 2002).
\item[109] \textit{See} Frank W. Miller, \textit{Prosecution: the Decision to Charge a Suspect with a Crime} 151 (Boston: Little, Brown 1969) (“Full enforcement of the criminal law in a sense that every violator of every statute should be apprehended, charged, convicted and sentenced to the maximum extent permitted by law has probably never been seriously considered a tenable ideal.”).
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to “partial enforcement.” Selective enforcement is a specific kind of partial enforcement, the selectivity feature of which makes it illegitimate.

In the 1886 *Yick Wo* decision, the Supreme Court recognized that a law could be facially neutral yet applied by an administrative agency differently to people in similar circumstances in a discriminatory way. Such a practice, the Court argued, injures the right to equal protection anchored in the Fourteenth Amendment. As Justice Matthews wrote:

Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Discretion exists on a scale. Low-discretion searches are conducted in response to specific information, while high-discretion searches are the result of proactive policing. Actions, which are initiated by the enforcement authorities, are more likely to involve selective enforcement as they involve discretionary decisions regarding allocation of resources. Pretext stops as part of the War on Drugs are high-discretion and part of proactive policy to find drugs. Therefore, pretext stops often go hand-in-hand with selective enforcement. In the case of the War on Terror there are actions of different kinds, including immediate reactions to specific events, leading to lower discretion and making selective enforcement claims are inherently weaker.

**IV. What Would Levinas Think of Racial Profiling?**

The discussion thus far has focused on traditional legal understandings of racial profiling, extending them to distinguish between the use of racial profiling in the War on Terror and the War on Drugs. What happens if we try to examine these cases through philosophical ethics? Do these two different cases have a different ethical structure, or are they the same form an ethical point of view? This inquiry focuses on the work of the French philosopher Emmanuel Levinas.

Levinas’ fundamental contribution, the *ethics of responsibility*, concerns the ethical relationship between the individual and the others. He distinguishes between the “Other,” an irreducible, entirely not understandable construct, and the “other” as used colloquially to distinguish between an individual and her surroundings. It is easiest to understand Levinas’ contribution in the first person. The encounter between me and the Other is an encounter that reveals my ethical responsibility towards him. When I see a person in front of me there is something about his

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112 *Cf. ALBERT F. WILCOX, THE DECISION TO PROSECUTE* 1 (Butterworths, 1972).


114 *Id. at 373-74.

115 *RAMIREZ, McDEVITT & FARRELL, supra* note 17, at 41-42.
presence that makes it wrong to kill him. In that, the basic ethical imperative “Thou shall not kill” is manifested. To Levinas, this is not a passive relationship in which my only responsibility is not killing the other; I am responsible even if I did not directly cause the death. I must try to prevent harm to others. If I see people suffering on television, my urge to help them expresses my responsibility for the Other.

Fundamental to Levinas’ analysis is the idea that the Other cannot be known; any knowledge about the Other makes him familiar and, thus, no longer an Other. The Other cannot be known in the same way an object is known and thus Levinas’ philosophy militates against any attempt to reduce the Other to a knowledge profile. The fact that I cannot know the object that I am responsible for means I cannot know what exactly I should do to fulfill such a responsibility. Thus I cannot formulate clear boundaries for my responsibility towards the Other. This borderless responsibility for the Other is what Levinas calls the “infinite responsibility” for the Other.\(^{116}\)

Levinas makes two ethical points crucial for our purposes. First, an important part of what makes me a human being is the basic infinite responsibility towards the Other. Second, the Other is not knowable; if the Other would become knowable, it will become part of what Levinas calls “the same” and will lose its alterity.\(^{117}\) According to Levinas, western philosophy aims to “a reduction of the Other to Same”\(^{118}\) by trying to understand everything about the Other in terms familiar to the individual, known as “totalization.”\(^{119}\) In contrast to this approach of current western culture, Levinas feels that no matter how much we come to know the Other there is always something about the Other that resists or disrupts the boundaries of the known.\(^{120}\)

With the above background, the remainder of this Part provides three preliminary hypotheses, which will be attenuated later in the Article. First, Levinas would find racial profiling “impossible” in the sense that we are not able to reduce the Other to knowable profile without ignoring that he is human. Second, Levinas would find racial profiling “unethical” since ethics is based upon the relation with the irreducible Other. Third, Levinas would find racial profiling “unjust” since just conduct consists of my fulfilling my duty to the Other.

**A. Racial Profiling Is Impossible**

For Levinas, it is not possible to reduce the Other to a single dimension such as race; doing so requires making the Other knowable and, thus, no longer an Other. In that sense, racial profiling is “impossible.” While it is obviously possible to look at skin color and use that to profile, Levinas would say that by doing so we treat the other as an object, ignore the fact that he is human, and thus treat him inhumanely.

But such a view of Levinas ignores an important part of Levinas’ philosophy—the role of the third person. We can also view Levinas from a different

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\(^{116}\) See **LEVINAS**, supra note 7, at 244.

\(^{117}\) See **LEVINAS**, supra note 7, at 38.

\(^{118}\) **LEVINAS**, supra note 7, at 43.

\(^{119}\) Id. at 35-40.

\(^{120}\) Id. at 43. See also **BENJAMIN HUTCHENS**, **LEVINAS: A GUIDE FOR THE PERPLEXED** 14-17 (Continuum International Publishing Group, 2004).
angle, a point of view that refers to two aspects we can ascribe to the concrete face of the other person in front of me. One aspect is Levinas’ unique way of describing the Other, in which the concrete face of the other is the way in which I encounter the absolute Other; the second aspect is a simple meaning of the face as visible object. If we read Levinas in this second way, we see the face not only as the face of an infinite and irreducible Other, but also as a the concrete visible and tangible face of the person in front of me. This tangible face can become a object, but it is an object that is never completely known because it represents the infinite (and unknowable) Other. Following this line of thought, racial profiling is impossible only if we think it gives us a complete and total concept of the Other. We must remember that racial profiling gives us some actual and true information about the other person, but we must also realize that this information is never complete. Any person that stands before me, because he is a person who is an Other and not an object, always “goes-beyond” any information I can receive. This is because information can only refer to knowable objects and not to the Other. This realization, that we can never completely know the person in front of us, must guide us every time racial profiling is being employed, and it doesn’t matter if it is employed in the War on Drugs or in the War on Terror.

B. Racial Profiling Is Unethical

Levinas would find racial profiling unethical. Levinas is famous for basing his ethics on the relation with the Other and not on the protection of society. As racial profiling exalts protection of society over the individual, it seems clear Levinas would argue against it.

Levinas considers the relation with the Other as inherently asymmetrical. The Other’s demand that “thou shall not kill me” exists prior to any action, reaction or thought an individual may have. In that sense Levinas' phenomenological account of the “face-to-face” encounter serves as the basis for his ethics as “first philosophy.” In the “face-to-face” relationship we are dependent upon the Other in ways of which we are unaware. We must respond to the Other and there is no limit to our responsibility for the Other.

Since we are responsible for the Other, we are responsible for the terrorist, even if he is our persecutor. Through racial profiling, where the infinite alterity of the Other seems to be ignored, the state abandons the infinite responsibly for the potential terrorist as an Other. Since the relation between the self and Other is the basic context in which ethical problems must be examined and since the self’s

121 LEVINAS, supra note 9, at 105.
122 Id. at 104.
124 EMMANUEL LEVINAS, ÉTHIQUE COMME PHILOSOPHIE PREMIERE 67-109 (Centre d’Exportation du Livre Français, 1998)
125 Id. at 75.
responsibility for the Other is more fundamental than freedom itself.\textsuperscript{126} Racial profiling which ignores the Other is wrong and unethical.

Things become less clear when we consider the relation that the self has with a third party, the victim of a terrorist or a drug trade. The third person is also an absolute Other for whom the individual is ethically responsible.\textsuperscript{127} Therefore the presence of the third person makes it necessary to constantly fix the asymmetry between the self and the Other and to balance ethical responsibilities. This balancing of ethical responsibilities can be done by laws that protect the person being profiled without neglecting the security of the “third party.”\textsuperscript{128}

Thus, racial profiling might be considered ethical if it responds to the ethical call of the third person. In the case of the War on Drugs it is difficult to argue that the protection of the third person by racial profiling is worth putting aside my responsibility for the Other in front of me. Although drugs are a serious threat to society, one can hardly compare them to the immediate and direct threat of a suicide-bomber. Conversely, since in the War on Terror racial profiling may save the third person’s life, the ethical status of racial profiling is elusive. There must be a balance between responsibility for the Other and the responsibility for the third person. Thus racial profiling is surely needed, but it must be performed while trying to treat the person profiled as a human being and not as an object.

\section*{C. Racial Profiling is Unjust}

Levinas distinguishes ethics from morality. Ethics involves the initial and basic encounter with the Other, whereas morality comes later, as an agreed upon rule or set of rules that emerge from the social situation containing more than two people. Morality appears in the encounter with a third party.\textsuperscript{129} Once such an interaction occurs, law and justice can emerge as a way to fix the asymmetry between the self and the Other.\textsuperscript{130} A just action or law is characterized by dynamically fixing the asymmetry with the Other and balancing ethical responsibilities within a social arrangement. For Levinas, justice is not the result of an agreement to employ consent to political ideas and it is not a response to self-interested rights including national security. For Levinas justice is only a constant balancing of the relation between the individual, the Other, and the third party.

In light of this understanding of justice it is possible to analyze whether Levinas would find racial profiling unjust. Racial profiling is often defended as a way in which society protects itself. Levinas would likely argue that the state should take risks regardless of the lack of security in order to protect the Other. Since Levinas would not engage in utilitarian cost/benefit analysis, he would probably

\textsuperscript{126} \textsc{Emmanuel Levinas, Existence and Existents} 79 (Alphonso Lingis trans., Springer-Verlag, New York, 1978).

\textsuperscript{127} \textsc{Levinas, supra} note 9, at 104.


\textsuperscript{129} \textsc{Levinas, supra} note 9, at 21-22.

\textsuperscript{130} \textit{Id.} at 30.
overrule the proportionality argument\textsuperscript{131} in favor of racial profiling discussed above. Racial profiling seems to be a demonstration of disproportional and imbalanced forms of actions in favor of security, neglecting freedom and justice.\textsuperscript{132}

But, as already noted, there is another way of looking at racial profiling; racial profiling might serve not the state, but the third person. We can understand racial profiling as creating a balance between our ethical responsibilities. Racial profiling which protects the third party is just only if it is performed while taking into consideration the infinite responsibility for the profiled Other.

Levinas demands that racial profiling takes into consideration a dynamic ethical structure. We cannot ignore the Other and turn him into an object to be profiled and must not prefer the good of the state over the good of the Other. At the same time we cannot neglect our ethical responsibility for the third person. Thus every discussion or action concerning racial profiling must occur within the complex ethical relation between the self, the Other, and the third person.

VI. Conclusion

This Article examined the phenomenon of racial profiling in the War on Terror and its roots in the War on Drugs. There are many reasons to object to racial profiling. It seems to be an unnecessary measure if its usefulness is outweighed by intelligence, information, and analysis techniques, and it can damage enforcement ability by focusing on those who “look suspicious” instead of those who “act suspicious.” It is by nature over-inclusive, in the sense that it focuses on the general characteristics and not on the uniqueness of each individual. This is especially true in profiles based on race, since relatively few people of any race are potential criminals.\textsuperscript{133} As discussed above, under legal principles it is easier to justify racial profiling in the War on Terror than in the War on Drugs. From an ethical philosophy view, however, Levinas’ focus on the Other person helps uncover basic ethical problems with the phenomenon of racial profiling, regardless of the context.

In Levinas’ philosophy the encounter between an officer of the state and the potential terrorist is unethical and unjust. When profiled an individual is never approached as a person but instead only as an object. In this way the state apparently ignores its ethical responsibilities to the person profiled. While this is true, understanding that a third party is always present within the phenomenon of racial profiling makes the analysis more complex. When we consider Levinas’ account of our ethical responsibilities for the third person we cannot dismiss racial profiling as simply unethical and unjust, for racial profiling may be necessary for the protection of the third party. This does not mean racial profiling is necessarily ethical or just, but only that it may be so. Racial profiling might be acceptable to Levinas if we use it to balance between our ethical responsibilities for the Other and the third party. In this way, racial profiling will only use the objective features (such as: race,

\textsuperscript{131} See supra Section III.B. (discussing the proportionality argument).
\textsuperscript{133} HARRIS, supra note 2, at 106.
appearance and suspicious behavior) to protect the third person, and would not ignore the Other, or reduce him entirely to the realm of the known.

How can we achieve such ethical racial profiling? Levinas does not give us a clear answer. This begs us to ask what exactly Levinas contributes to the racial profiling debate. Levinas helps focus the racial profiling debate on pure ethical discourse. In this Article, by uncovering the ethical relation between an individual, the Other and the third person, we were able to understand the basic ethical structure of racial profiling and recognize the important ethical problems it raises. The question we should be asking is not whether we applaud the War on Terror or the War on Drugs. Instead, the problem with racial profiling is based on the mere act of profiling; an act which reduces the Other to a knowable object and in an inhuman way ignores his inherent otherness.

Levinas allows us to approach this problem head-on—not by creating a better or more accurate profile, but by understanding our ethical responsibility for third parties. When we understand this responsibility we can understand the necessity of balancing between our infinite responsibility towards the Other, which Levinas forces us to recognize regardless of who the Other is, and our responsibility towards the third party. This puts us in a new situation in which the first concern is for the person being profiled, whether or not he is a terrorist. Our duty to protect others came second in our analysis as a way of balancing of our infinite responsibility towards the Other being profiled. Armed with this ethical structure, we, as a society, can base our decisions regarding racial profiling on ethical in addition to political or legal grounds. This wide perspective on racial profiling seems to have been lacking in the employment of racial profiling by Bush Administration, and it can be more than useful for the Obama Government.