The Dirty Little Secret

By Jonathan Michaels

In just one month's time, the long-anticipated overhaul to the Corporate Average Fuel Economy (CAFE) regulations will take effect, marking the first increase in the U.S. fuel economy standard since the start of Ronald Regan's second term. The CAFE regulations, enacted in response to the 1973 Oil Crisis, establish the minimum standards auto manufacturers must meet across all vehicle lines, or pay substantial penalties. The standard has remained at 27.5 miles per gallon for the last 25 years; yet all of this is set to change in January, when the standard begins its march from 30.2 miles per gallon in 2011 to 35 in 2020.

This, it was held, would move the United States toward greater energy independence, increase the production of clean renewable fuels, and reduce our impact on the environment.

Car makers have responded to the legislation by making more fuel-efficient internal combustion engines and, more publicly, by racing to the market with hybrid and electric vehicles. GM states it is proud to be "a leader on a path to energy independence." Nissan claims that its focus is "innovation for the planet." Public support has never been stronger for eco-friendly products, and manufacturers are happy to supply fleets of new vehicles that cater to the emotion of doing something good for the environment. Yet, amidst the rush to produce, and consume, the next best thing that will save the planet, what is the truth behind the environmental sensitivity of hybrid and electric vehicles? You might not like the answer you are about to hear.

As famous as hybrid and electric vehicles have become for their fuel savings, they are beginning to develop an infamy for the pollutants they create in the manufacturing process.

To assess a vehicle's impact on the environment, it is necessary to consider the entire life cycle of the vehicle, from inception to destruction. While fuel consumption is the most obvious factor, it is but one factor among many to be considered. Also included in the analysis are design and engineering, raw material sourcing, manufacturing, transportation, distribution and marketing, recycling and disposal. Hybrid and electric vehicles certainly excel in fossil fuel consumption, but the analysis is not so one dimensional.

As famous as hybrid and electric vehicles have become for their fuel savings, they are beginning to develop an infamy for the pollutants they create in the manufacturing process. With nearly 400 pounds of battery packs on board the average electric vehicle, the complexity of the manufacturing process has skyrocketed, which requires more energy and creates more emissions. As a recent study undertaken by Toyota found, the Prius was the worst in its class for emissions created during the manufacturing process. Another study found that it takes 113 million BTUs of energy to manufacture a Prius, which is the functional equivalent of about 1,000 gallons of gasoline consumed before the vehicle ever hits the showroom floor.

And, then there is the matter of the raw materials. Hybrids and electrics are powered by one of two battery technologies: nickel-metal hydride and lithium ion. The rare earth elements used to produce these batteries (lanthanide and lithium) are strip-mined from solid rock, refined into their core elements, transported from their country of origin to the place where they will be manufactured into usable battery packs (usually China or Japan), and then transported again to the auto manufacturer assembly plant, where they finally make their way into the environmentally-friendly vehicle.

But, what is perhaps most surprising about the hybrid and electric vehicle is the impact consumer use has on the environment, as this is the area where the hybrids and electrics are seemingly impenetrable. While hybrids and electrics certainly have a far less direct use of fossil fuel than their internal combustion

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Toyota workers assemble parts on new Prius hybrid vehicles at Toyota Tsutsumi Plant in Japan.

counterparts, they also have an indirect use that is quite staggering.

Every hybrid and electric vehicle draws its energy by plugging into the electric grid, and this drawdown of energy itself results in pollution to the environment. But, just how much? The answer to that question depends largely on where you live, and more specifically, how much electricity your country generates from dirty sources such as coal and oil. In Germany, 49 percent of all energy is derived from fossil fuels; in the United States, it is 55 percent So, how much pollution is emitted by plugging an electric vehicle into an electric grid that derives 55 percent of its energy from dirty sources?

"Pollution" is actually broken down into five separate chemical compounds: carbon monoxide, carbon dioxide, hydrocarbons, nitrogen oxide and sulfur oxide. In a report published by the U.S. General Accounting Office, the impact of an electric vehicle plugged into the electric grid was compared with the tailpipe emissions of an internal combustion vehicle, with startling results. Carbon monoxide and hydrocarbons were virtually nonexistent with the electric vehicle; carbon dioxide and nitrogen oxide were at the same level in both vehicles; and the electric vehicle emitted *12 times* more sulfur oxide than the internal combustion vehicle. Sulfur oxide is a precursor to acid rain and atmospheric particulates, and is associated with increased respiratory symptoms and disease, difficulty in breathing, and premature death.

At least one study has attempted to quantify the impact hybrid and electric vehicles have had on the environment as compared to internal combustion vehicles. In a study entitled *"Dust to Dust"* by CNW Marketing Research Inc., 312 production vehicles were ranked on an "energy cost per mile" basis. The report found that in many cases, hybrid vehicles had higher energy costs than conventional cars. For instance, the Honda Accord hybrid had an energy cost of $3.29 per mile, while the conventional Honda Accord was $2.18, meaning that the Accord hybrid will consume about 50 percent more energy than the non-hybrid version.

While car makers should be applauded for the efforts to find a solution that will eliminate dependence on foreign oil and reduce harmful effects to the environment, all that glitters is not gold in the hybrid and electric vehicle market — at least not yet. Perhaps as technology improves and further alternative fuel sources are explored, we will get much closer to the answer we are looking for. But, in the mean time, we shouldn't be fooled into thinking that we are helping the environment by plugging in that new electric car.

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The Impending Death of California's 'Community Caretaker'

By Patrick T. Santos

The end is near for California's "community caretaker" exception to the Fourth Amendment's warrant requirement established by the state Supreme Court's plurality decision in *People v. Ray* over 10 years ago. This is because *People v. Ray* will finally get to meet the U.S. Supreme Court's decision in *Brigham City v. Stuart*, in a case that the state Supreme Court will hear on Dec. 7, 2010: *People v. Troyer* (SC 180759.)

In *People v. Ray*, two police officers were dispatched to the defendant's home on the afternoon of Christmas Day in response to a neighbor's call that "'the door has been open all day and it's all a shambles inside.'" The neighbor did not know if anyone was home. The officers found the front door was two feet open, and they could see through the open door that the front room appeared to be ransacked. The officers repeatedly knocked and announced their presence but there was no response. There were no signs of forced entry but, based on his experience, one officer believed there was a "`95 percent' likelihood they had encountered a burglary or similar situation." The officers decided to enter the residence to conduct a security check, "`to see if anyone inside might be injured, disabled, or unable to obtain help' and to determine whether a burglary had been committed or was in progress." No one was inside, but the officers saw large amounts of cocaine and money in plain view.

Justice Janice Rogers Brown, in the lead opinion, writing for three justices, held the officers' warrantless entry through the open front door was not valid under the traditional emergency aid exigency analysis. While the officers were concerned about the possibility of an injured person inside the residence, they had no knowledge of any facts that would lead a reasonable person in their position to believe "entry was immediately necessary to aid life or limb."

Notwithstanding, the *Ray* plurality held the officers' warrantless home entry was valid under the "community caretaking" exception because they "acted reasonably to protect the safety and security of persons and property when they briefly entered defendant's residence without a warrant and then observed contraband in plain view." "While the facts known to the officers may not have established exigent circumstances or the apparent need to render emergency aid, they warranted further inquiry to resolve the possibility someone inside required assistance or property needed protection." Chief Justice Ronald M. George, in the concurring opinion, which also garnered three votes, held the officers' entry into the residence was permissible under the traditional exigent circumstances doctrine. They did not discuss whether any other exception to the warrant requirement applied. Justice Stanley Mosk, in a strong dissenting opinion found the warrantless entry was illegal and rejected both exigent circumstances and the creation of a "community caretaker" exception. Since *Ray*, warrantless home entries are constitutionally permissible if the officer's conduct is prompted by the motive of preserving life and the conduct reasonably appears to be necessary for that purpose. The linchpin of the exception is the complete disconnect from criminal investigatory activity. Thus, any subjective intention or motivation (even in cases of mixed motives) on the part of the officer to solve crimes will transform the caretaker back into an officer. Only if the officer's motivations are entirely pure can he be called a true "community caretaker."

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California courts were not the only ones to recognize this new way around the Fourth Amendment's chief evil. New York, for example, had *People v. Mitchell* (39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, 609 (1976).) *Mitchell*, like *Ray*, turned on the entering officer's subjective intent. The U.S. Supreme Court unanimously rejected the *Mitchell* test in *Brigham City*, and simultaneously superseded *Ray* — implicitly at least.

In the landmark *Brigham City* case, the U.S. Supreme Court affirmed that the subjective motivation of the officer is generally irrelevant. It is clear from *Brigham City*, an emergency is to be viewed from an objective perspective and not whether the motivation of the officer was or was not to protect innocent people. Just in case this point was not clear enough after *Brigham City*, the U.S. Supreme Court in *Michigan v. Fisher* (130 S. CT. 546 (2009)), again affirmatively held that the test for emergency aid is an objective one.

Despite *Brigham City*'s clear command, California's 1st District Court of Appeal in *People v. Madrid* (168 Cal. App. 4th 1050, 85 Cal. Rptr. 3d 900 (1st Dist. 2008)), continued to use *Ray*'s "community caretaker" terminology. In *Madrid*, the court accepted the *possibility* that the community caretaking exception might justify stopping a vehicle. Several California courts continue to use the alliterative exception despite its utter incongruity with *Brigham City* — this should change with *People v. Troyer.*

On April 28, 2010, the state Supreme Court unanimously voted to grant review of *People v. Troyer*, an unpublished case out of the 3rd District Court of Appeal,

In deciding *People v. Troyer*, the Court of Appeal seamlessly relied exclusively upon *Brigham City* and *People v. Ray* to conclude that a warrantless entry into a locked upstairs bedroom was not constitutionally permissible. As a result, the state Supreme Court will finally get a chance to revisit *People v. Ray* — hopefully, the result will mark an important change in California search law. That is, hopefully the "community caretaker's" death is impending.

Equivocality aside, the community caretaker exception has been unconstitutional since *Brigham City.* Determined that our high Court be made aware of this, I drafted and submitted an application to file an amicus curiae brief in *People v. Troyer* on behalf of the Law Offices of Ronald Richards and Associates. I read somewhere that the term "amicus curiae" literally means a friend of the court; one who gives information for the assistance of the court on some matter of law on which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts.

Hopefully, the Court will use *People v. Troyer* to deliver the final blow to *People v. Ray*, and effectively allow practitioners and lower courts to avoid the exception altogether. Time and time again, the U.S. Supreme Court has flatly rejected any consideration of officer subjective motivations in determining a search's constitutionality. The state Supreme Court is excepted to adopt objectivity in *Troyer.*

A purely objective approach is what the law requires and what all defendants are entitled to after *Brigham City.* Anything less is illegal. The High Court has other important issues to reach in *Troyer,* but signaling *Ray*'s death knell would be of great assistance to lower courts and practitioners alike.

Californians need community caretakers, but without consent and without *true exigencies*, our cherished caretakers may not make warrantless home entries — *sui generis* intent or not.