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Opponents question police recording ban

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Even if he wanted to, Chicago attorney Craig Benson Futterman said he likely could not comply with an Illinois law that allows citizens to photograph or videotape police officers but bars them from recording the officers' words.

"I'm not even sure how to turn off the audio on my cellphone," Futterman said.

And Futterman said he would not want to hit the "off" button if he spotted an on-duty police officer on the street or in another public place violating someone's civil rights.

The First Amendment protects the right to make such recordings, Futterman said.

And he said still or moving images can constitute good evidence of what really happened in an encounter between police and civilians.

"Technology — YouTube, video cameras, cellphones — has probably done more to raise public awareness about the realities of police abuse and the need for reform than anything else in the last couple of decades," said Futterman, of the Edwin F. Mandel Legal Aid Clinic at the University of Chicago Law School.

Futterman said an audio recording can help put the images of an incident into context.

"The sound can be incredibly valuable, too, in understanding what's going on," Futterman said.

Not everyone sees it that way.

For example, James Pasco, the executive director of the Fraternal Order of Police, rejects the notion that letting people record public encounters between police and civilians helps deter official misconduct.

Pasco told Reason Magazine last year that such recordings — video as well as audio — are "an extreme and intrusive response to a problem that's so rare it might as well not exist."

In that circumstance, Pasco said, the danger that recordings will be edited to make the police look bad outweighs any need for them.

For his part, Judge Richard A. Posner of

the 7th U.S. Circuit Court of Appeals appears to have no problem with the provision of the Illinois Eavesdropping Act that bars making audio recordings of police in public.

During oral arguments earlier this week in a challenge to that ban, Posner said the law is "full of limitations" on free speech.

And Posner suggested that prohibiting audio recording but not photographing or videotaping the police constitutes a reasonable — and constitutional — limitation on free speech.

Also hearing arguments in the case were Judges Diane S. Sykes and David F. Hamilton.

Under the Illinois law, audio taping police is a Class 1 felony that carries a penalty of four to 15 years in prison.

The law includes an exception that allows police to record any "enforcement stops" without the consent of the civilians who are stopped.

The prohibition on audio taping police is being challenged by the America Civil Liberties Union of Illinois (ACLU).

The ACLU asked U.S. District Judge Suzanne B. Conlon for a declaration that it is constitutional to make audio recordings of police officers engaged in their official duties in public and speaking loud enough to be heard by "the unassisted human ear."

The ACLU also asked Conlon for an injunction that would have barred officials from enforcing the audio recording ban against the ACLU's planned program of recording traffic stops and other police actions.

But Conlon held that the ACLU lacked standing to pursue the suit.

Conlon said the ACLU had not shown that it faced an imminent threat of injury because it had not shown that Cook County State's Attorney Anita M. Alvarez had threatened to prosecute it.

During oral arguments in the ACLU's appeal, Posner indicated that he believed the merits of the case were on Alvarez's side.

There is a "quantum difference" between the impact made by images alone and the

impact made when sound is included, Posner told Chicago attorney Richard J. O'Brien of Sidley, Austin LLP, who argued the case for the ACLU.

Posner said broadcasting an accident victim's "every groan and scream and shriek" brings more unwelcome attention to the victim than merely reporting on the incident from notes taken at the scene.

The possibility of being the object of public curiosity if caught on audiotape also might make witnesses reluctant to talk to police, Posner said.

And this reluctance would extend to confidential informants, Posner said, brushing off assertions that police would not interview such people in public.

Assistant Cook County State's Attorney James C. Pullos, who argued the case on behalf of Alvarez, said another basis for upholding the ban was police officers' interest in privacy.

That contention did not seem to go over well with Hamilton.

Hamilton said the case concerned the constitutionality of making audio recording openly in a public place, not surreptitious taping someone in a private setting.

Sykes also appeared to be skeptical of some of Pullos' arguments.

At one point, Sykes, a former newspaper reporter, told Pullos he seemed to be arguing in support of an "extraordinarily broad restriction" on the right to a free press.

The case before the 7th Circuit is *The American Civil Liberties Union of Illinois v. Anita Alvarez*, No. 11-1286.

Opponents of Illinois' ban on making audiotapes of police say police have the right to arrest anyone obstructing them from carrying out their official duties.

But police do not have the right to go further and slap the cuffs on a reporter, blogger or anyone else who is not getting in their way, opponents contend.

And Futterman, who is not involved in the litigation over the eavesdropping law, said modern technology has made it possible to make a record of an encounter between police and civilians from a safe distance.