tors to tell women before performing abortions after 20 weeks that abortion *does* cause pain to the child. It also requires doctors to offer anesthesia for the child.

The left usually insists on anesthesia-softened executions of criminals on death row, but it wants no anesthesia for unborn children. That, they argue, poses an "unnecessary" risk to the lives of women. Practices the left wouldn't permit at animal hospitals or penitentiaries are so essential to its abortion project it will fake up scientific claims in hopes people will feel better about failing to afford the unborn child even the slight courtesy of deadening its pain.

An observer of the Nazi death camps once remarked on the increasing viciousness of the camp guards through the course of the war, saying: "those you abuse, you grow to hate" for, presumably, the weight of guilt they and their dead fellows lay on their abusers' shoulders. In a stunning example of the phenomenon, Margaret Sanger grandson Alexander Sanger has described the unborn child as a "liability, a threat, and a danger to the mother and to the other members of the family." The slightest consideration given unborn children might seem to hint that maybe we're dealing with human beings, so the left relegates them to a level below animals, unworthy of any humane considerations whatever. And, as they do so, they are consumed by their hate for fellow human beings they've never even seen. CPR

The Law

Newdow *vs.* the Pledge, the sequel

The athiest's anti-God jihad continues to miss its target.

HAROLD JOHNSON

SACRAMENTO EMERGENCY-ROOM physician Michael Newdow, probably the country's most famous atheist, wants the Pledge of Allegiance banned from public schools, on the theory that the words "Under God" amount to establishment of religion. He's now into his second anti-Pledge lawsuit against the Elk Grove School District south of Sacramento, and his litigating is spawning fascinating case law — but not primarily on the issue that brought him to court. So far, it's the procedural twists and turns that are creating precedents that could echo down the years.

You'll recall that Newdow originally won at the Ninth Circuit, but the case was tossed by the U.S. Supreme Court last year because he had named his elementary-school daughter as plaintiff, even though he did not have legal custody of the girl. The Supreme Court implicitly rebuked the Ninth Circuit for letting Newdow's lawsuit go forward in the face of the California Family Code rule that lets the custodial parent make decisions about the child's education and religious upbringing. (The girl's mother, who had custody, opposed Newdow's lawsuit and filed a friend-of-the-court brief supporting the Pledge.)

Some accused the Supreme Court of timidly ducking the religion-in-schools issue, but the court's decision was, in fact, a welcome affirmation of federalism. Questions of parental rights have traditionally been seen as matters of state law, to be dealt with by state legislators and state courts. Depending on how you read the Ninth Circuit's decision, it either contorted

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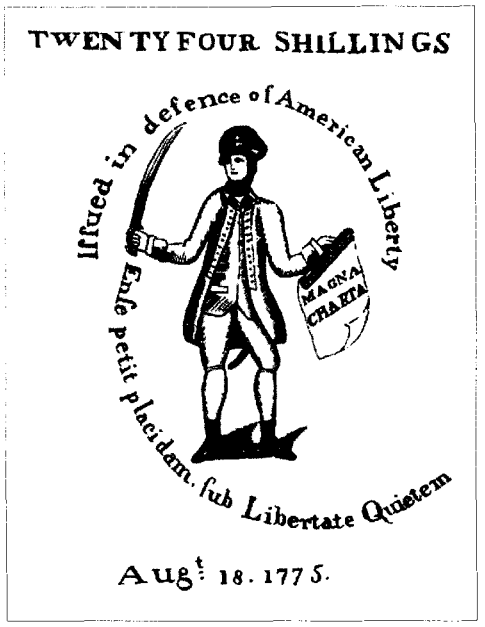
California rules, or replaced them with a new federal standard. Either way, state law was not shown deference, and the Supreme Court set that right.

Unfazed, Dr. Newdow returned to court this year with new plaintiffs: parents whose standing to sue on behalf of their children can't be questioned. But his new case has been driven into a new procedural thicket by Sacramento federal Judge Lawrence Karlton. In September, the judge ruled that he was bound by the previous Ninth Circuit decision and, therefore, the Elk Grove District flouts the First Amendment by having teachers lead students in the Pledge.



Dr. Newdow's case has been driven into a new thicket by federal Judge Lawrence Karlton.

THIS RULING left nearly all legal commentators scratching their heads. It's "puzzling," said Stanford Law School Professor Pamela Karlan, that Judge Karlton said the Ninth Circuit case "commands him to do something, since that case was effectively wiped from the books by the Supreme Court's holding that Mr. Newdow didn't have standing." UCLA's Eugene Volokh concurred, blogging that the "Ninth Circuit's substantive decision [has lost] any precedential value ...."

It's true that, when a case is reversed because of a particular holding in the decision, it may still stand as precedent for other, unrelated points that it articulated. But this principle shouldn't apply to the Ninth Circuit ruling in Newdow's case. No part of that decision should bind other courts or Judge Karlton because the Supreme Court said the merits of Newdow's case should never have been addressed in the first place: Newdow had no standing to be in court.

So, the three-judge Ninth Circuit panel that considers Newdow's new lawsuit on appeal will first have to decide whether Judge Karlton is correct. The court's answer will give devotees of arcane points of civil procedure something to ponder and write up in law reviews, while future law students may find the question on exams.

But as for any other lasting legacy from Newdow's legal crusade against the Pledge, that is much less likely. In reversing the Ninth Circuit on procedural grounds last year, three Supreme Court justices took the occasion to state affirmatively that the Pledge, even when said in schools, does not violate the Establishment Clause. This statement should have surprised no one, because more than once while reviewing First Amendment issues, the court has observed in passing that the words "Under God" in the Pledge are perfectly constitutional, amounting to "ceremonial" patriotism.

In fact, the words are a quote from Lincoln's Gettysburg Address (where the sixteenth president expressed the hope "that this nation, under God, shall have a new birth of freedom"). The phrase's lineage stretches back from there to the Declaration of Independence, which defined human rights as "endowed by our Creator." The Gettysburg Address was in large part a rumination on the Declaration; Lincoln specifically cited the Declaration's proposition that "all men are created equal." His reference to the nation as "under God" was part of his restatement of the Declaration's propositions.

The Pledge restates those principles again. It is not a religious assertion, but a statement of simple fact — that America's founding belief holds that human beings enjoy rights as gifts from a higher power. In that sense, America is, by its self-understanding, a nation "Under God."

The Pledge acknowledges this fact; it is a fact that neither the Ninth Circuit nor the Supreme Court could erase from history or from our defining documents.

At the end of the day, the words won't be stricken, the Pledge won't be banished from schools, the Supreme Court will rule against Newdow and he will have to find another crusade into which to channel his curiously relentless zeal. CPR

Role model

Schwarzenegger finally hitting stride

by William E. Saracino

Behaving like Winston Churchill in the darkest hours early in World War II, California Governor Arnold Schwarzenegger firmly yet serenely appears to be turning what many political professionals presumed only a matter of weeks ago was already a near-certain rout into at least a partial and possibly a smashing victory against his Democrat/Big Labor opponents. (Exactly, by the way, what my colleague Christopher Shelton, in last issue's *CPR*, suggested the governor *had* to do to win.) Latest word is that although the governor's spending-control measure (Proposition 76) continues to look weak, parental notification for minors' abortions (Prop. 73), teacher tenure (Prop. 74), and, far and away most importantly, paycheck protection (Prop. 75) are in strong positions to pass. Redistricting (Prop. 77) could go either way.

California's public employee union bosses reportedly split early this year over how to react when Schwarzenegger moved ahead with a special election, sending to the voters in the form of several ballot measures the major elements of his broad plan, born in the Gray Davis recall of 2003, to "blow up the boxes" of state government. It was, our sources tell us, unions representing, perhaps ironically, most state workers and police and prison guards that argued for working out some sort of compromise with the governor. But they were overruled by California Big Labor's eight hundred-pound gorillas: the California Teachers Association and the Service Employees International Union, which set a course of total war expected to annihilate the governor.

The resulting non-stop anti-Schwarzenegger saturation bombing over television succeeded in dragging down his formerly very high approval ratings, but failed in its main objective: goading Schwarzenegger, expected to panic as his numbers fell, into waving a white flag. Schwarzenegger is now in full attack mode, filling the airwaves with his pro-reform message. CTA worries publicly about going bankrupt. The union message against Proposition 75 — Paycheck Protection, ending Big Labor's practice of taking public employees' money for politics without permission — seems to be failing to persuade even its own members to oppose the measure. (And even the *Los Angeles Times* endorsed it, editorially arguing that "At many levels of government, public employee unions, aided by their

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