Whether state action is a necessary element of a cause of action under this section is the most difficult issue presented by this case. In view of the restricted application of *Jones* to section 1982, racial discrimination and enforcement of the thirteenth amendment, it does not eliminate the state action requirement under this section. However, the recent interpretations of 18 U.S.C. § 241, the criminal conspiracy statute, indicate that there is at least a strong minority on the Supreme Court which feels that state action is not necessary under that statute. In *United States v. Guest*,[30] four separate opinions were written expressing differing views. Although the majority held that sufficient state action was shown to prevent dismissal of the indictment,[31] three justices said that section 241 reached all conspiracy, public or private, interfering with fourteenth amendment rights, and three others felt that Congress had the power under section 5 of the fourteenth amendment to punish private conspiracy. It is unclear whether this decision represents a trend toward the removal of the state action requirement. There is also a difference in language between 18 U.S.C. § 241 and 42 U.S.C. § 1985(3) which compounds the difficulty. Section 241 speaks of conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Section 1985(3) punishes conspiracy "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws . . . ."

The leading case in the interpretation of section 1985(3), *Collins v. Hardyman*,[32] requires state action under this statute. In that case defendants disrupted a meeting of plaintiffs' political club. Plaintiffs alleged that defendants conspired to deprive them of the equal protection of the laws and equal privileges and immunities under the laws by disrupting a meeting of a group whose views defendants disagreed with, while not disturbing meetings of political groups the defendants agreed with. Plaintiffs also alleged that as a result of this conspiracy they were deprived of their right to assemble and petition the government for redress of grievances. The Supreme Court, with three justices dissenting, held that the complaint failed to state a cause of action under 8 U.S.C. § 47(3).[33] The decision was based on construction of the statute, not its constitutionality as applied to private discrimination. A conspiracy to be actionable under this section must be for the purpose of depriving plaintiffs of the equal protection of the laws or equal privileges and immunities under the laws. Such a conspircy must be shown independent of an overt act to deprive another of any rights or privileges of a citizen. Plaintiffs failed to show such a conspiracy. Their right to equal protection of the laws of Cali-

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[30] 383 U.S. 745 (1966).

[31] *Id.* at 756. The indictment alleged that one means of carrying out the conspiracy was "[b]y causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts."

[32] 341 U.S. 651 (1951).

[33] Now 42 U.S.C. § 1985(3) (1964).

fornia remained unimpaired. The wrong committed by defendants was in violation of state law, and there was no indication that the state would not enforce the law. "Such private discrimination is not inequality before the law unless there is some manipulation of the law or its agencies to give sanction or sanctuary for doing so."[34]

The facts in *Gannon* are very similar to those in *Collins*. Both concern rights secured by the first amendment. The defendants in both were acting in violation of state law. In neither case did plaintiffs show that they were deprived of the equal protection of the laws. The court in *Gannon* did not discuss *Collins* in its opinion.

The *Collins* decision has not been overruled; as recently as April 1969, it was held to be controlling by the Fifth Circuit Court of Appeals in *Griffin v. Breckenridge*.[35] In that decision Judge Goldberg discussed at length the effect of the *Jones* and *Guest* decisions on the interpretation of section 1985(3) and concluded that they did not apply. *Jones* applies only to section 1982 and is based on the thirteenth amendment. The majority of the justices in *Guest* held that state action was necessary under the equivalent criminal conspiracy statute.

In conclusion, it appears that the first amendment right of freedom of religion is protected by the Reconstruction Civil Rights Acts only from interference in which the state is involved, not from private discrimination. In view of the recent decisions of the Supreme Court, the requirement of state action in such cases may disappear in the near future, but it is now still in effect. ". . . [W]e recognize that the citadel of state action is under heavy attack, but we reluctantly concede that as yet it has not fallen."[36] Until it does, the victims of such demonstrations must seek their remedy in the state courts.

SUSAN P. CRAMER

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**Constitutional Law**—CONDITIONS AND PRACTICES OF THE ARKANSAS PRISON SYSTEM CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.—*Holt v. Sarver* (E.D. Ark. 1970).

Petitioners, inmates of the Arkansas State prison system, brought class actions against the administrators of the system to have conditions and practices at the prisons declared unconstitutional and permanently enjoined. The United States District Court for the Eastern District of Arkansas *Held, inter alia*, that various conditions and practices of the Arkansas prison system

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[34] Collins v. Hardyman, 341 U.S. 651, 661 (1951).
[35] 410 F.2d 817 (5th Cir. 1969).
[36] *Id.* at 821.

combined to render the confinement of prisoners therein a cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution of the United States. *Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970).

Although the principal decision of *Holt v. Sarver*[1] is admittedly the first to condemn a state's entire penal system as violative of the eighth amendment's prohibition against "cruel and unusual punishments,"[2] the court's holding was the evolutionary product of United States Supreme Court decisions construing the term, lower federal courts' applications of the term to various penal conditions, and, more specifically, prior decisions of the federal courts relating to the Arkansas prison system. An extensive examination of the ban against cruel and unusual punishment by the United States Supreme Court was *Weems v. United States*.[3] Plaintiff in error had been convicted by Phillipine courts of falsifying a public document, and sentenced to fifteen years at hard and painful labor in chains, loss of all assistance, authority and rights, and lifetime regulation and surveillance.[4] The Supreme Court, in applying the Phillipine constitutional protection against cruel and unusual punishment copied from the United States Constitution, held that the sentence imposed violated that protection. The Court acknowledged that its previous decisions, holding that shooting[5] and electrocution[6] as modes of execution were not *per se* cruel and unusual, did not define the term with precision.[7] It was found that the motivation for the inclusion of the provision in the Bill of Rights was to guard against the infliction of torture and cruelty by those in power, such as had occurred in England and America with the use of the rack, the stake, and drawing and quartering.[8] However, the Supreme Court in *Weems* looked beyond specific tortures or penalties and stated that the eighth amendment provision was one which should adapt to societal changes:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new condi-

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1 309 F. Supp. 362, 365 (E.D. Ark. 1970).

2 U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3 217 U.S. 349 (1910).

4 *Id.* at 366.

5 Wilkerson v. Utah, 99 U.S. 130 (1878).

6 *In re* Kemmler, 136 U.S. 436 (1890).

7 The Court in *Wilkerson*, at 99 U.S. 135, 136, stated:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to [Blackstone], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.

Similarly, in *In re Kemmler*, the Court stated at 136 U.S. 447 the following:

> Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

8 217 U.S. 349 (1910).

> tions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.
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> . . . .
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> . . . The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.[9]

The amendment's adaptable feature, as expressed in *Weems*, was of great importance in subsequent application of the constitutional provision.

The prohibition against cruel and unusual punishment was initially held to apply only to the federal government and not the states.[10] However, with the increased application of the Bill of Rights provisions to the states through the fourteenth amendment during the last quarter-century, federal constitutional protection against cruel and unusual punishment has been extended to apply to the states.[11] The provision's protective scope also expanded, apparently moved by social change and public opinion "enlightened by a humane justice."[12] The Supreme Court ruled that denationalization of a citizen upon conviction of and dishonorable discharge for wartime desertion amounted to a cruel and unusual punishment, despite the lack of any physical "torture."[13] The Court's majority opinion stated the reasoning for applying the amendment as follows:

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.
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> The exact scope of the constitutional phrase "cruel and unusual" has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime,

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[9] *Id.* at 373, 378.

[10] O'Neil v. Vermont, 144 U.S. 323 (1892); *In re* Kemmler, 136 U.S. 436 (1890); Pervear v. The Commonwealth, 72 U.S. (5 Wall.) 475 (1866).

[11] Robinson v. California, 370 U.S. 660 (1962); *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (prohibition against execution in cruel manner applicable to states).

[12] Weems v. United States, 217 U.S. 349, 378 (1910).

[13] Trop v. Dulles, 356 U.S. 86 (1958).

> but any technique outside the bounds of these traditional penalties is constitutionally suspect. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[14]

The United States Supreme Court later held that a California statute making the "disease" or state of drug addiction a criminal offense, subjecting the defendant to imprisonment, was cruel and unusual punishment prohibited by the eighth and fourteenth amendments.[15] The Court also ruled that the constitutional prohibition was not violated by the execution of a death sentence after a previously unsuccessful attempt,[16] or by punishment for public drunkenness.[17] The majority of the Supreme Court refused to even consider whether capital punishment for an offense not involving the taking or endangering of human life was cruel and unusual under contemporary world and American "standards of decency."[18]

From the decisions of the United States Supreme Court concerning cruel and unusual punishment there have developed three general approaches to the problem of determining what constitutes such punishment. The three have been stated as follows:

> The first approach is to ask whether under all the circumstances the punishment in question is "of such a character * * * as to shock general conscience or to be intolerable to fundamental fairness." . . . Secondly, a punishment may be cruel and unusual if greatly disproportionate to the offense for which it is imposed. . . . Finally, a punishment may be cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim; that is, when a punishment is unnecessarily cruel in view of the purpose for which it is used.[19]

The decisions of *Monroe v. Pape*,[20] holding that a person could utilize the Civil Rights Act to obtain relief against persons acting under color of state law, and *Cooper v. Pate*,[21] holding that persons confined in state prisons were

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14 *Id.* at 99-101.

15 Robinson v. California, 370 U.S. 660, 667 (1962):
We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

16 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

17 Powell v. Texas, 392 U.S. 514 (1968).

18 Rudolph v. Alabama, 375 U.S. 889 (1963).

19 Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See* Rudolph v. Alabama, 375 U.S. 889 (1963).

20 365 U.S. 167 (1961).

21 378 U.S. 546 (1964). 42 U.S.C.A. § 1983 reads as follows:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

within the protection of § 1983 of the Civil Rights Act, unleashed a flood of litigation in federal courts. Many conditions and practices of state prisons were challenged by inmates as violations of the constitutional prohibition against cruel and unusual punishments. The federal courts, while recognizing the states' province in maintaining internal discipline at state prisons, nonetheless intervened where it appeared that substantial constitutional violations existed.[22] Abusive practices and decrepit conditions were found to exist at various penal institutions throughout the United States. Use of such facilities as "strip cells"—small, completely barren cubicles in which unclothed prisoners were confined—was prohibited as "cruel and unusual punishment."[23] Similar "dry cell" confinement was enjoined by a federal court.[24] The negligent wounding of a prisoner by an armed trusty was held to constitute cruel and unusual punishment, making the prison superintendent liable for damages under the Civil Rights Act.[25] The courts also found several practices not to constitute cruel and unusual treatment. Under ordinary conditions, such things as confinement of a sane prisoner in a medical center devoted in part to the care of mentally defective prisoners,[26] the use of solitary confinement as a disciplinary measure,[27] and uniform inmate mailing privileges[28] are not considered to be cruel and unusual, thereby constituting unlawful administration of a prison sentence. Thus, through the Civil Rights Act, federal courts have, reluctantly or not, used the eighth amendment's "cruel and unusual punishment" clause as a tool of penal reform.[29]

The principal decision of *Holt v. Sarver*,[30] concerning the entire Arkansas prison system, is the apparent culmination of a series of litigations begun in 1965.[31] *Talley v. Stephens*[32] was the first step taken by Arkansas inmates to curb unconstitutional practices of the penal system. The federal district court, while refusing to ban whipping and other forms of corporal punishment as unconstitutional *per se*, enjoined the use of such methods until adequate safeguards were established to prevent excessive, emotionally-inflicted punishment upon prisoners.[33] It also enjoined alleged reprisals taken against prisoners seeking access to the courts to voice grievances, and further found "no difficulty with the proposition that for prison officials knowingly to compel convicts to perform physical labor which is beyond their strength, or which constitutes

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[22] Wright v. McMann, 387 F.2d 519, 522 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Cal. 1966).

[23] Wright v. McMann, 257 F. Supp. 739 (N.D. N.Y. 1966), *rev'd*, 387 F.2d 519 (2d Cir. 1967); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[24] Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

[25] Roberts v. Williams, 302 F. Supp. 972 (N.D. Miss. 1969).

[26] Austin v. Harris, 226 F. Supp. 304 (W.D. Mo. 1964).

[27] Courtney v. Bishop, 409 F.2d 1185, 1187 (8th Cir. 1969).

[28] Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965).

[29] Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

[30] 309 F. Supp. 362 (E.D. Ark. 1970).

[31] *Id.* at 368.

[32] 247 F. Supp. 683 (E.D. Ark. 1965).

[33] *Id.* at 689.

a danger to their lives or health, or which is unduly painful constitutes an infliction of cruel and unusual punishment . . . ."[34]

Two years later,[35] the district court held that use of the "strap"[36] as punishment would be enjoined, as the "adequate safeguards" required in the *Talley* decision had not been satisfactorily observed. The court also permanently enjoined the use of shocking devices, teeter boards or the whipping of the bare skin of the prisoners.[37] The Eighth Circuit Court of Appeals, after a careful review of the pertinent Supreme Court decisions, ruled as follows:

> [U]se of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th Century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.[38]

The appeals court in *Jackson* restrained the use of any corporal punishment as a disciplinary measure. However, the court still continued to recognize the wide constitutional latitude held by prison officials in maintaining internal discipline. In 1969 the circuit court of appeals rejected the contention of an Arkansas inmate that his being placed in solitary confinement due to misconduct constituted cruel and unusual punishment, but ruled that such was a matter of the prison's internal discipline and consequently outside federal jurisdiction.[39]

The federal district court decision in 1969 of *Holt v. Sarver*[40] (known as *Holt I*) consisted of three consolidated cases which never terminated and appeared before the court again in the subsequent *Holt* decision.[41] After examining several aspects of Arkansas prison life including use of inmate labor to operate the facilities, barracks-type accommodations and the isolation units, the court ruled that the state was not discharging its constitutional duty to protect inmates and that confinement in the isolation cells constituted cruel and unusual punishment. The district court made suggestions for alleviating the unlawful conditions and requested a "progress report" from prison officials within thirty days.[42]

All of the federal decisions ordering cessation of cruel and unusual practices, however, failed to save the entire system from attack as violative of the eighth amendment. The principal decision of *Holt v. Sarver*[43] dealt with in-

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34 *Id.* at 687.
35 Jackson v. Bishop, 268 F. Supp. 804 (E.D. Ark. 1967).
36 The "strap" is a wide leather whip attached to a wooden handle. *Id.* at 809.
37 *Id.* at 816.
38 404 F.2d 571, 579 (8th Cir. 1968).
39 Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969).
40 300 F. Supp. 825 (E.D. Ark. 1969).
41 Holt v. Sarver, 309 F. Supp. 362, 368 n.3 (E.D. Ark. 1970).
42 300 F. Supp. 825, 834 (E.D. Ark. 1969).
43 309 F. Supp. 362 (E.D. Ark. 1970).

mates' contentions that the various "conditions and practices within the System are such that confinement there amounts to a cruel and unusual punishment . . . ."[44] The United States district court, after extensively describing conditions and practices prevalent in the Arkansas prisons, sustained the claim and declared the Arkansas Penitentiary System as a whole unconstitutional.[45] The court enumerated the apparently distinguishing features of the penal system which, taken together, contributed heavily to the inhuman conditions of imprisonment therein. First, the system has very few paid employees, but relies heavily upon trusty and inmate labor. This extends even to the guarding and care of other prisoners. Secondly, the inmates are housed in open dormitory-type barracks. Large numbers of men are placed together, and the resulting confrontations and feuds render unpleasant conditions dangerous. Finally, there exists no meaningful rehabilitation program.[46] These conditions contributed heavily to the court's conclusion that the total situation existing within the prisons of the system rendered it unconstitutional. The court summarized the reasons for its admittedly sweeping decision as follows:

> One cannot consider separately a trusty system, a system in which men are confined together in large numbers in open barracks, bad conditions in the isolation cells, or an absence of a meaningful program of rehabilitation. All of those things exist in combination; each affects the other; and taken together they have a cumulative impact on the inmates regardless of their status.[47]
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> For the ordinary convict a sentence to the Arkansas Penitentiary today amounts to a banishment from civilized society to a dark and evil world completely alien to the free world, a world that is administered by criminals under unwritten rules and customs completely foreign to free world culture.
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> It is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being, and possible rehabilitation. It is one thing for the State not to pay a convict for his labor; it is something else to subject him to a situation in which he has to sell his blood to obtain money to pay for his own safety, or for adequate food, or for access to needed medical attention.
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> However constitutionally tolerable the Arkansas system may have been in former years, it simply will not do today as the Twentieth Century goes into his eighth decade.[48]

The series of judicial attacks upon the Arkansas penal system, culminating in *Holt v. Sarver*,[49] is ample proof of the power of federal courts to protect citizens, even though prisoners of the state, from unconstitutional conditions

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[44] *Id.* at 364.
[45] *Id.* at 381.
[46] *Id.* at 367.
[47] *Id.* at 373.
[48] *Id.* at 381.
[49] 309 F. Supp. 362 (E.D. Ark. 1970).

and practices. The federal district court acted judiciously and with restraint considering the appalling conditions it found existing within the prison walls. But when it appeared that piecemeal reform of various problems of the system were not effective, the court exercised its power to apply the provisions of the eighth amendment in light of contemporary social standards and penal reforms. While the Arkansas system may have presented an obvious target for judicially-enforced reform, the message to other jurisdictions should be clear indeed. Federal courts possess the power and have the duty to protect constitutional rights, and state institutions and practices which violate those rights are subject to scrutiny. And if entire state institutions or systems are found to constitute cruel and unusual punishment, it appears that in light of the United States Supeme Court's mandate that application of the amendment "draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"[50] the federal judiciary will not hesitate to condemn the offending institutions. Reform, if not voluntary, will be federally enforced before the system is allowed to continue. As stated in *Holt v. Sarver*: "The lives, safety, and health of human beings, to say nothing of their dignity, are at stake. The start must be prompt, and the prosecution must be vigorous. The handwriting is on the wall, and it ought not to require a Daniel to read it."[51]

DENNIS G. LINDER

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**Insurance—THE WORD INCURRED AS USED IN THE MEDICAL COVERAGE CLAUSES OF STANDARD AUTOMOBILE INSURANCE POLICIES DOES NOT COVER ANTICIPATED MEDICAL COSTS.—*Hein v. American Family Mutual Insurance Co.* (Iowa 1969).**

The plaintiff's son was injured in an automobile accident while riding as a passenger in a classmate's car. At the time of the accident, the plaintiff had two automobile policies covering "all reasonable medical expenses incurred within one year from the date of the accident."[1] The insured alleged $323.45 for medical services already performed and $1,250.00 for two anticipated operations to be performed more than one year after the date of the accident. The insurance company admitted that the policies were in full force and effect at

50 Trop v. Dulles, 356 U.S. 86, 101 (1958).
51 Holt v. Sarver, 309 F. Supp. 362, 383 (E.D. Ark. 1970).

1 Most policies contain similar provisions to the effect that they will pay all reasonable medical expenses if such expenses are incurred within a fixed period of time from date of the accident regardless of whether they are in a medical liability policy, an automobile policy, or a homeowner's policy. *See, e.g.*, Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (Fla. Dist. Ct. App. 1964); 8 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 4896 (1962).

the time of the accident and that it was legally liable for actual services rendered.[2] The insurer, however, denied liability for the two future operations because the operations were not incurred within the one year period. The district court entered judgment for the defendant-insurer and the plaintiff appealed. The Iowa supreme court, *Held*, affirmed, with all justices concurring. The word "incurred" as used in the medical coverage clauses of standard automobile insurance policies does not cover anticipated medical costs, even though those costs are the direct result of an injury which took place during the fixed period. *Hein v. American Family Mutual Insurance Co.*, 166 N.W.2d 363 (Iowa 1969).

The basic issue in *Hein v. American Family Mutual Insurance Co.* concerned the meaning of the word *incurred* as it is used in the medical indorsement clause of standard automobile liability insurance policies. In the eight jurisdictions[3] that have litigated the meaning of the word *incurred* in this context, three basic interpretations have emerged. Under the first interpretation, the insurer has not been held liable until the medical services have been actually performed.[4] This view results from the interpretation that medical expenses are not *incurred* until medical services have been actually performed. The rationale in support of this view is that, until the services have been performed, the insured is not obligated to pay for them.[5] In *Reliance Mutual Life Insurance Co. v. Booher*,[6] the insured received an emergency operation to suture facial lacerations and was advised by her doctor that further surgery could not be performed until her flesh had begun to heal. The plaintiff engaged the doctor to perform anticipated surgery that would take place more than a year after the accident. The policy insured plaintiff for medical expenses incurred within fifty-two weeks from the day of the injury. The Florida

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[2] The defendant insurance company actually paid nothing because the policies had a clause limiting liability to excess insurance over any other valid and collectable automobile medical insurance. The plaintiff had already received $323.45 from the classmate's automobile policy and another $343.45 was paid by the plaintiff's employer's group insurance. This excess liability clause was also at issue in this case, but it will not be considered herein.

[3] *Florida*: Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (Fla. Dist. Ct. App. 1964); *Georgia*: Pilot Life Ins. Co. v. Stephens, 97 Ga. App. 529, 103 S.E.2d 651 (1958). *Iowa*: Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363 (Iowa 1969). *Michigan*: Hoehner v. Western Cas. & Sur. Co., 8 Mich. App. 708, 155 N.W.2d 231 (1967). *North Carolina*: Czarnecki v. American Indem. Co., 259 N.C. 718, 131 S.E.2d 347 (1963). *New York*: Perullo v. Allstate Ins. Co., 54 Misc. 2d 303, 282 N.Y.S.2d 830 (Dist. Ct. 1967); Whittle v. Government Employees Ins. Co., 51 Misc. 2d 498, 273 N.Y.S. 2d 442 (Sup. Ct. 1966). *Ohio*: Drobne v. Aetna Cas. & Sur. Co., 66 Ohio L. Abs. 1, 115 N.E.2d 589 (Ct. App. 1950). *Texas*: Maryland Cas. Co. v. Thomas, 289 S.W.2d 652 (Tex. Ct. Civ. App. 1956); Marroquin v. Trinity Universal Ins. Co., 394 S.W.2d 246 (Tex. Ct. Civ. App. 1965).

[4] *See* Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (Fla. Dist. Ct. App. 1964); Pilot Life Ins. Co. v. Stephens, 97 Ga. App. 529, 103 S.E.2d 651 (1958); Czarnecki v. American Indem. Co., 259 N.C. 718, 131 S.E.2d 347 (1963); *cf.* Herold v. Aetna Life Ins. Co., 77 S.W.2d 1060 (Tex. Ct. Civ. App. 1935); Myers v. Kitsap Physicians Serv., 1 Wash. App. 272, 460 P.2d 686 (1969).

[5] Reliance Mut. Life Ins. Co. v. Booher, 166 So. 2d 222 (Fla. Dist. Ct. App. 1964).

[6] *Id.*