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

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.*

District Court of Appeals held: "The plaintiff's engagement of the services of the surgeon for his future services constituted a contingent promise to pay for his services, and the expense was not incurred until the contingency occurred, which was the surgeon's performance of the services."[7]

The second interpretation of the word *incurred* is that the insurer's liability is not predicated on the actual performance of the services within the stated period, but on whether they have been paid or contracted for within the fixed period.[8] In the leading case of *Maryland Casualty Co. v. Thomas*,[9] the plaintiff's nine year old son suffered serious injuries to his mouth and teeth in an automobile accident. Because of his young age, the injuries could not be remedied until after the expiration of the one year policy limitation. However, the father within the one year period contracted with the dentist for the work to be done. The court found in favor of the insured, reasoning that a debt had been incurred regardless of whether the services had been performed within one year from the date of the accident. *Hoehner v. Western Casualty and Surety Co.*[10] presents a similar situation. In this case, however, the insured paid the expenses in advance of the operation. The court reached the same conclusion as was reached in the *Thomas* case.

Under the third interpretation, the insurer's liability arises if the medical services were brought on, occasioned, or caused within the fixed time period from the date of the injury.[11] The rationale in support of this interpretation is that the insurer at the time of the initial service undertook liability for all medical services resulting from the accident, regardless of the time within which the services were completed.[12] The initial service included the diagnostic procedures.[13] In *Perullo v. Allstate Insurance Co.*[14] the insured had a policy covering all reasonable surgical expenses incurred within one year from the date of the accident. After the accident, the insured consented to an operation but did not enter into a contract or pay his account in advance. The preparation for surgery and diagnosis continued during the entire one year limitation, and the operation was performed one year and seven days after the accident. Despite the absence of a contract or a prepaid account, the New York court held that the insurer was liable for all the medical expenses for injuries caused by the accident.

Most decisions interpreting the word *incurred* as it is used in *Hein v.*

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7 *Id.* at 224.

8 *See* Drobne v. Aetna Cas. & Sur. Co., 66 Ohio L. Abs. 1, 115 N.E.2d 589 (Ct. App. 1950); Hoehner v. Western Cas. & Sur. Co., 8 Mich. App. 708, 155 N.W.2d 231 (1967); Maryland Cas. Co. v. Thomas, 289 S.W.2d 652 (Tex. Ct. Civ. App. 1956).

9 289 S.W.2d 652 (Tex. Ct. Civ. App. 1956).

10 8 Mich. App. 708, 155 N.W.2d 231 (1967).

11 *See* 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.2d 442 (Sup. Ct. 1966); *cf.* McCleneghan v. London Guarantee & Accident Co., 132 Neb. 131, 271 N.W. 276 (1937). *Contra,* Marroquin v. Trinity Universal Ins. Co., 394 S.W.2d 246 (Tex. Ct. Civ. App. 1965).

12 Whittle v. Government Employees Ins. Co., 51 Misc. 2d 498, 273 N.Y.S.2d 442 (Sup. Ct. 1966).

13 Perullo v. Allstate Ins. Co., 54 Misc. 2d 303, 282 N.Y.S.2d 830 (Dist. Ct. 1967).

14 *Id.*

American Family Mutual Insurance Co.[15] have placed emphasis on technical definitions of the word *incurred* to support their holdings. They have relied on Latin origin,[16] dictionary definitions,[17] *Words and Phrases*,[18] legal encyclopedias,[19] or other cases defining *incurred* though not involving the present issue.[20] The court should, however, look beyond technical definitions to the expectations of the average insurance buyer as well as to public policy considerations.[21] The average purchaser of this type of insurance expects it to cover his medical expenses and relieve the anxiety of financial costs[22] when he or a member of his family is injured.[23] Few buyers consider the possibility of long diagnostic periods before the actual corrective services begin.[24] To the average insurance purchaser the word *incurred* in medical endorsement clauses means that his policy will pay for all medical costs resulting from the initial accident regardless of when they are, in fact, completed.[25] As a matter of public policy the courts generally favor the insured when insurance policy interpretation problems arise,[26] since it is well established that insurance policies are contracts of adhesion.[27] There appears to be no reason why, in the instant case, the situation should be treated differently.

Moreover, it would be easier for insurance companies to build into their

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[15] 166 N.W.2d 363 (Iowa 1969).

[16] ". . . one 'incurred' expenses when he ran into an obligation to pay money; as derived from the Latin verb incurrere, meaning to hasten, to run, to hurry. . . ." Hoehner v. Western Cas. & Sur. Co., 8 Mich. App. 708, 717, 155 N.W.2d 231, 236 (1967).

[17] "Webster's New International Dictionary says, 'Incur' means to 'render liable or subject to; to become liable or subject to; to bring down upon oneself as to incur debt, danger, displeasure, penalty, etc.' The New Century Dictionary says that the word 'incur' means to 'become liable or subject to through one's own action; bring upon oneself: as to incur liabilities or penalties.'" Maryland Cas. Co. v. Thomas, 289 S.W.2d 652, 655 (Tex. Ct. Civ. App. 1956).

[18] "'Incur means to become liable or subject to; to render or become liable or subject to through one's own action or to bring upon one's self.' 20A Words and Phrases, Perm. Ed., page 452." Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363, 367 (Iowa 1969).

[19] "In 42 C.J.S., page 553 regarding 'incurred' the editor states: 'It is a word denoting the past tense, and defined as meaning became liable for, ...'" Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363, 367 (Iowa 1969).

[20] "Counsel have not cited, nor has our research disclosed any case in which we have considered this precise question, although in Flanagan v. Baltimore & Ohio R.R. Co., 83 Iowa 639, 643, 644, 50 N.W. 60, 61, we briefly considered the meaning of the word 'incurred' in another context and indicate it means 'paid out' or 'became liable for.'" Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363, 367 (Iowa 1969).

[21] *See, e.g.*, German Alliance Ins. Co. v. Kansas, 233 U.S. 389 (1914); Patterson, *Administrative Control of Insurance Policy Forms*, 25 COLUM. L. REV. 253 (1925); Note, *Constitutionality of Insurance Rate Regulation*, 25 HARV. L. REV. 372 (1912).

[22] Jackson v. Country Mut. Ins. Co., 41 Ill. App. 2d 300, 190 N.E.2d 490 (1963).

[23] Nagy v. Lumbermens Mut. Cas. Co., 100 R.I. 734, 219 A.2d 396 (1966); Faude, *The New Standard Automobile Policy: Coverage (Insuring Agreements and Exclusions)*, 1955 INS. L.J. 647 [hereinafter cited as Faude].

[24] Note, *Medical Payment Coverage Within Liability Insurance Policies*, 25 WASH. & LEE L. REV. 308 (1968).

[25] *See* Jackson v. Country Mut. Life Ins. Co., 41 Ill. App. 2d 300, 190 N.E.2d 490 (1963).

[26] *See generally* 44 C.J.S. *Insurance* § 297 (1945); IOWA R. CIV. P. 344(f)(14).

[27] *See, e.g.*, R. KEETON, BASIC INSURANCE LAW 60 (1960); W. VANCE, INSURANCE § 41 (3d ed. 1951); Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

costs this additional coverage,[28] while the insured is usually unaware of the possibility of non-coverage or additional medical expenses. The primary purpose of insurance is spreading the loss as well as the risk.[29] This purpose is thwarted if the insured is not allowed to recover in situations similar to that presented in the *Hein*[30] case.

In deciding the *Hein* case, the Iowa supreme court relied heavily on the *Thomas*[31] and *Hoehner*[32] cases, which require a contract or prepayment of future medical expenses as a condition to recovery. The *Thomas* case necessitated having an attorney[33] to contract physicians for future services, while *Hoehner* required the insured to have the money to pay for the entire future medical costs before the termination of the fixed period. Generally people do not consult an attorney to file a claim with an insurer but usually wait until they have difficulty collecting.[34] If the insured does consult an attorney before the fixed period lapses, the problem of a speculative contract is encountered.[35] Since the attorney will wish to cover all possible anticipated medical expenses for future services, which may not be readily ascertainable, he will see to it that the contract is for the maximum amount of the policy. Some of these funds may never be needed, or the contract may be void for lack of definiteness.[36] The interpretation that would require an advance payment to the physician defeats another basic reason for having insurance. One purchases insurance to avoid the possibility of paying large medical bills all at once, or to avoid the possibility of no treatment at all due to a poor financial condition.[37] The policy of requiring a person to pay the entire sum before the lapse of the fixed period obviously favors the wealthier person.

While an actual tender of an advance payment to the physician or a contract for future medical expenses are convenient tools to secure the insurer's liability,[38] they are unnecessary. The purpose of the one year limitation or any other such period of limitation is to assure that a claim is the result of the initial accident.[39] It would appear that a simple statement of cause

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[28] *See generally* A. MOWBRAY, R. BLANCHARD, & C. WILLIAMS, INSURANCE—ITS THEORY AND PRACTICE IN THE UNITED STATES, Ch. 4 (6th ed. 1969).

[29] *See, e.g.*, Jordan v. Group Health Ass'n, 107 F.2d 239 (D.C. Cir. 1939); Home Title Ins. Co. v. United States, 50 F.2d 107 (2d Cir. 1931), *aff'd* 285 U.S. 191 (1932); W. VANCE, INSURANCE § 1 (3d ed. 1951); Note, *Insurance: Regulation: What Constitutes Insurance?*, 23 CORN. L.Q. 188 (1937).

[30] Hein v. American Family Mut. Ins. Co., 166 N.W.2d 363 (Iowa 1969).

[31] Maryland Cas. Co. v. Thomas, 289 S.W.2d 652 (Tex. Ct. Civ. App. 1956).

[32] Hoehner v. Western Cas. & Sur. Co., 8 Mich. App. 708, 155 N.W.2d 231 (1967).

[33] For a more complete discussion, *see* Woodroof, *Survey of Iowa Law*, 19 DRAKE L. REV. 368 (1970).

[34] CHANGING TIMES, Sept. 1968, at 24.

[35] Woodroof, *Survey of Iowa Law*, 19 DRAKE L. REV. 368 (1970). *See also* Faude, *supra* note 23 at 648. While Faude speaks in terms of an advance contract and Woodroof speaks in terms of a speculative contract, both have exactly the same concept in mind.

[36] *See generally* L. SIMPSON, CONTRACTS § 43 (2d ed. 1965).

[37] Fontenot v. Wabash Life Ins. Co., 243 La. 1049, 150 So. 2d 10 (1963).

[38] Note, *Medical Payment Coverage Within Liability Insurance Policies*, 25 WASH. & LEE L. REV. 308 (1968).

[39] Faude, *supra* note 23, at 648. "This requirement, of course, is present in order to establish a definite cut-off date and to bar claims which speculatively attribute present

from the doctor would accomplish this more satisfactorily.

Perhaps the entire situation may be best remedied by insurance companies themselves[40] or by the state insurance commissions. However, the insurance companies can hardly be expected to welcome this added coverage if they can avoid it, as they have been permitted to do by the *Hein* decision, and the insurance departments of most states appear to be unaware of the problem.[41]

The third interpretation—that liability arises if medical services were caused within the fixed time period from the date of the injury—presents none of the problems mentioned herein and actually promotes the social purpose of insurance. The Iowa supreme court failed to consider any decision presenting this viewpoint when it decided the *Hein* case. Perhaps when the situation is again presented the court will take notice of cases following the third viewpoint, and then adopt this more advantageous approach.

PATRICK H. PAYTON

Parent and Child—THE DOCTRINE OF PARENTAL IMMUNITY DOES NOT APPLY WHERE BOTH THE PARENT AND CHILD ARE DECEASED AS A RESULT OF THE ALLEGED TORTIOUS CONDUCT.—*Brinks v. Chesapeake & Ohio R.R.* (W.D. Mich. 1969).

Steven Brinks, an unemancipated minor, and his mother were killed in an automobile accident when they collided with defendant. Plaintiff, the father, brought this action individually and as administrator of the estate of the child, alleging that the negligence of the defendant was the proximate cause of the accident. The defendant filed a third party complaint alleging that the negligence of the mother was also a proximate cause of the accident, and therefore her estate was to be treated as a joint tort-feasor as to any judgment recovered against the defendant. Plaintiff moved to dismiss the third party complaint because of the parental immunity doctrine, urging that since the estate of the child could not recover from the estate of his mother, neither can the child's estate recover indirectly by third party contribution. The court denied plaintiff's motion and *Held* that the doctrine of parental immunity does not apply where both the parent and child are deceased as a result of the alleged tortious

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expenses to an accident occurring long before." *See also* French v. Fidelity & Cas. Co., 135 Wis. 259, 115 N.W. 869 (1908); Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N.W. 1055 (1906).

[40] "Such cases in time may also illustrate the need of revising this one-year requirement, lest the premium on foresight should become distorted to a temptation for the claims-conscious." Faude, *supra* note 23, at 648.

[41] The fact that litigation of this problem is so infrequent probably accounts for this. However, the problem will not remain this way as medical techniques are improved. *See* Note, *Medical Payment Coverage Within Liability Insurance Policies*, 25 WASH. & LEE L. REV. 308, 312 (1968).