As Keeton and O'Connell see it, the basic flaw in the present system has to do first with the concept of liability in traffic accidents, and, second, with the relationship between the insurance company and the driver. As stated, for most accidents liability is an elusive and unproductive question. With 103,000,000 licensed drivers, there are going to be an enormous number of accidents regardless. The larger social need is to compensate those who are injured, or whose property is damaged, in such a way as not to bankrupt those who are putatively responsible. Hence they propose a system which would suspend the issue of liability for the first $10,000. The insurance companies would routinely pay up to $10,000 per victim for out-of-pocket losses, which consist principally of medical expenses and wage losses. Much of the time it is impossible to determine who, if anyone, was to blame for an accident, but it is always possible to find out who gets hurt.

The key difference between the Basic Protection plan and the old workman's compensation system is that the new plan eliminates the need to make the often very difficult judgment as to what a sprained back, etc., is worth. The victim is simply paid, by his insurance company, whatever his actual losses in wages and medical expenses and property damage are.

Under this system, persons would still go to court when the injury is permanent and serious—i.e., costing more than $10,000 and, it is hoped, involving someone else's responsibility. But the overwhelming number of small cases would be handled quickly and efficiently out of court. In that way the danger is avoided that in the effort to make settlements prompt, but moderate, some victims with large and legitimate claims will be forced to settle for less than a jury would award.

The second and crucial element in the Keeton and O'Connel Basic Protection plan has to do with the relationship between the insurance company and the driver. As they see it, much of the present misery derives from the fact that this relationship is, with but rare exceptions, an adversary one. The company wants to pay as little as it can; the victim wants to get as much as possible.

Keeton and O'Connell argue that this is inevitable given that the company insures the other fellow. They propose to solve it by the simple process of having the company insure the victim. This is exactly what happens, for example, with fire insurance. Householders buy their own insurance. If their house catches fire, regardless of who is responsible (barring fraud), their company compensates them. The settlement process involves a relationship between a business firm and one of its clients. Thus, the many hundreds of thousands of fire insurance claims are settled each year with nothing like the turmoil accompanying automobile claims.

It is hard to fault the Basic Protection scheme. The authors are right in their facts, and right in the all-important perception as to what it is Americans are good at. We are good at maintaining business relationships once a basis for mutual self-interest is established. The Basic Protection plan would establish one. Moreover, they are right in seeing the insurance issue as part of the general issue of Taming the Automobile, to use the title of a long law review article by O'Connell which proposed many of the present Federal safety programs. (His book, "Safety Last," written with Arthur Myers, was judged by Lewis Mumford to be the best of its kind, in competition even with Ralph Nader's redoubtable "Unsafe at Any Speed.")

Professor Conard has written of Basic Protection that it is "surely one of the most important law books of the current decade. . . . To find legal effort on a similar scale, one would have to go back over 30 years to the famous study by Frankfurter and Green of the labor injunction." Variations on the Keeton-O'Connell proposal are certainly possible. Thus the Massachusetts Democratic Advisory Council has proposed a mixed system, with Basic Protection for personal injuries and liability insurance for property damage. But in all its essentials, it is hard to deny the fundamental rightness of the Basic Protection plan.

Nor is it difficult to see that it provides the private insurance industry with a means for insuring that their business stays private. What then has been their reaction?

The ominous and manifest fact is that the reaction so far has been not very different from—has been very near identical to—that of the automobile industry to the criticism of vehicle design that began in the mid-nineteen-fifties and ended a decade later with Federal regulation. Let it be clear that the rather small group of persons who formulated what are now the general outlines of public policy in traffic safety did not at first assume that Government regulation