parties seeking legislation was economic or political, utilized in *NOW* in ascertaining whether immunity from antitrust infractions existed was "both incapable of application and inconsistent with First Amendment case law."[119]

A concern was expressed that a reading of *Noerr* as conferring immunity from antitrust liability upon any activity aimed at influencing governmental action would amount to a sanction of restraints of trade that merely abut first amendment rights.[120] To infer that Congress' intention was to resolve conflicts between the free enterprise system and first amendment rights by merely affording unlimited protection to violators of antitrust laws whose anticompetitive activities included petitioning the government would, in the *Osborn* court's opinion, clearly be in error.[121]

The political activity exclusion from antitrust liability is a volatile issue in the courts. Undoubtedly, as more courts are faced with the problem the Supreme Court will be called upon to resolve the conflict. The denial of certiorari in *Missouri v. National Organization for Women, Inc.*[122] did not, of course, involve a decision on the merits.[123] Resolution of the conflict will involve more than the mechanical application of *Noerr* ordained by the Eighth Circuit in its decision in *Missouri v. National Organization for Women, Inc.* Balancing the competing interests will force the conclusion that the right to free speech and the protection of the free enterprise system can co-exist.

The inapplicability of the *Noerr* doctrine to situations where anticompetitive methods are utilized to obtain a non-anticompetitive result does not suggest the demise of *Noerr,* but to the contrary, suggests that the applicability of *Noerr* is narrowly drawn to situations where anticompetitive effects result from constitutionally proscribed behavior. There is nothing constitutionally proscribed about an economic boycott aimed at achieving an unrelated political result. The restraint of trade that results from NOW's boycott activity must be divorced from the political aspirations of its participants. The *Noerr-NOW* analysis is neither a complete nor a true reflection of the issues involved.

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119. 499 F. Supp. at 558 n.8.

120. *Id.* at 556.

121. *Id.*

122. 620 F.2d 1301 (8th Cir.), *cert. denied,* 101 S. Ct. 122 (1980).

123. A denial of certiorari "simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter of 'sound judicial discretion.' " Maryland v. Baltimore Radio Show, 338 U.S. 912, 917 (1950). Such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. *Id.* at 919. Various reasons underlie a Court's refusal to grant certiorari. "A case may raise important questions but the record may be cloudy. It may be desirable to have different aspects of an issue further determined by the lower courts. Wise adjudication has its own time for ripening." *Id.* at 918.

EVIDENCE—WHEN THERE IS A CLOSE RELATIONSHIP BETWEEN THE WITNESS AND THE PROPERTY AND THE PROPERTY IS OF A UNIQUE QUALITY, ACTUAL VALUE TESTIMONY ON STOLEN PROPERTY IS PROPER WITHOUT SHOWING AN ABSENCE OF MARKET VALUE.—*State v. Savage* (Iowa 1980).

Appealing a conviction for second degree theft[1] for stealing seven rebuilt locomotive radiator cores and one new core, Kenneth B. Savage made a number of arguments,[2] including the contention that there was insufficient proof to convict him of having stolen property exceeding five hundred dollars in value.[3] The only evidence put on by the state as to the value of the radiator cores was the testimony of the storekeeper for the Chicago and Northwestern Transportation Company, which owned the stolen property.[4] The storekeeper stated in his testimony that the value of a new core was $370.00 and that he personally believed the rebuilt cores were each worth approximately $25.00 less than a new one.[5] The defendant challenged the admissibility of the state's witness's testimony concerning the stolen property; Savage argued that because the witness-storekeeper admitted to a lack of knowledge as to the rebuilt cores' market value, the storekeeper's testimony should have been stricken from the record.[6] The trial court overruled the motion.[7] The Supreme Court of Iowa *held,* affirmed. Market value is the

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1. Under IOWA CODE § 714.2 (1979) a conviction for second degree theft requires that one must steal more than $500 in property but less than $5000. Hence, the grade of the offense charged as well as the severity of the sentence are determined by the value of the property.

2. In responding to one of Savage's contentions, the court held that since flight was not an element of the theft offense, the state was not required to prove flight "by proof beyond a reasonable doubt." State v. Savage, 288 N.W.2d 502, 507 (Iowa 1980). Therefore, it was not a denial of due process to instruct the jury that it could "find the fact of flight by a preponderance of the evidence." *Id.* This ruling does not conflict with the majority rule stated in In Re Winship, 397 U.S. 358, 364 (1970), where the accused is protected against conviction except upon proof beyond a reasonable doubt of every element of the crime charged. *See also* Patterson v. New York, 432 U.S. 197 (1977).

The court also dismissed the defendant's claim that the trial court erroneously instructed the jury on the issue of establishing the value of the goods beyond a reasonable doubt. 288 N.W.2d at 508. The court reasoned that the instructions were not ambiguous and that they fairly set forth the law. *Id.* Further, the court stated, "a defendant does not have the right to have instructions submitted in any particular form." *Id.*

Finally, in re-stating the established majority view that jury instructions "must be read and construed as a whole," the court held that the trial court did not erroneously instruct the jury on the reasonable doubt standard as applied to evidence not presented. *Id.* at 508-09.

3. *Id.* at 503.

4. The storekeeper was responsible for "purchasing, storing, issuing, and controlling anything to do with company material." *Id.* at 503.

5. *Id.* at 503-04.

6. *Id.* at 504.

7. *Id.*

appropriate standard for determining the value of stolen property, but evidence of the property's actual value may be introduced in its place without showing the absence of market value when a close relationship exists between the non-owner witness and the property, and the property is of a unique quality. *State v. Savage*, 288 N.W.2d 502 (Iowa 1980).

In *Savage*, the court presented what may be its most controversial and questionable decision concerning the issue of what type of value testimony is proper in determining the value of stolen property. The court pointed out that the "value" of stolen property is defined in Iowa Code section 714.3[8] as the " 'normal market or exchange value within the community at the time that it is stolen.' "[9] Further, the principle that market value testimony is the proper measuring device to be used in determining the value of stolen property finds support in Iowa[10] as well as in a majority of states nationwide.[11] Nonetheless, in *Savage*, this rule as to proof of stolen property value is partially eroded through the court's decision.

In confronting the defendant's contention that the storekeeper was incompetent to testify as to the market value of the rebuilt radiator cores, the *Savage* court developed a lengthy argument describing the courts' liberal attitude towards such testimony.[12] The court noted that the testimony as to value should be liberally received[13] and that witness competency rules on questions of value are "always liberally construed."[14] Further, the court

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8. Iowa Code § 714.3 (1979). The *Savage* decision was the first case to deal with this recently revised section as it applies to questions of value. Prior to 1979 the applicable section was Iowa Code § 709.2 (1977) (repealed 1978), under which a convicted felon who stole property worth more than $20.00 could be sentenced up to five years imprisonment, fined up to $1,000, or both.

9. 288 N.W.2d at 503. *See* Iowa Code § 714.3 (1979).

10. The most recent Iowa case to support this rule was State v. Boyken, 217 N.W.2d 218, 220 (Iowa 1974). In *Boyken*, the court defined the "fair market value" to be "what a willing buyer would pay a willing seller in the open market place." *Id.* at 221.

11. *See, e.g.*, People v. Paris, 182 Colo. 148, ___, 511 P.2d 893, 894-95 (1973) (failure to present evidence as to reasonable market value justified case's dismissal); State v. Day, 293 A.2d 331, 334-35 (Me. 1972)(only where the evidence shows that no ascertainable market value exists for a stolen item may evidence as to other value such as replacement cost be introduced); Cleveland v. State, 85 Nev. 635, ___, 461 P.2d 408, 409 (1969)(fair market value is to be used for an item where it exists). *See also* McCormick, Handbook on the Law of Damages 170 (1st ed. 1935)(courts insist on market value "as the measure of direct property loss, where it is available and adequate, as it usually is.") [hereinafter cited as McCormick]; Schalliol, *The Broad Evidence Rule and Fire Insurance and Tort Recoveries for Household Goods*, 1973 Ins. L.J. 365, 376 (July)(where market value for destroyed personal property exists it must be the proper measuring device rather than the property's value to its owner).

12. 288 N.W.2d at 504.

13. *Id.*

14. *Id.* (quoting City Nat'l Bank v. Jordan, 139 Iowa 499, 504, 117 N.W. 758, 760 (1908)(farmers who had much experience with horses and who had bought a particular horse and owned it for a number of years were competent to testify as to its value)).

stated that broad definitions have been given to the term "market value."[15] The court used these broad statements as support for its affirming the admissibility of the storekeeper's value testimony.

Despite the defendant's contentions to the contrary, the court held in *Savage* that the storekeeper was testifying as to the market value of the stolen rebuilt cores.[16] In a strong dissent, Justice Allbee indicated that the storekeeper admitted in his testimony that he was expressing solely a personal opinion with no knowledge of the core's market value.[17] The court apparently gave little attention to a statement it had made six years earlier in which it stressed that market value cannot be determined by a subjective standard considering a particular person's own belief.[18] The *Savage* court held that the trial court did not abuse its discretion in allowing the witness to testify as to market value,[19] but the court went further by stating that the testimony was proper even if it concerned actual value.[20]

Although the court agreed that generally "[a]ctual value . . . may be resorted to only upon a showing of the absence of market value for the items,"[21] the court nonetheless established two factors which remove the requirement that the state must show an absence of market value before proving actual value in its place.[22] The first factor is the existence of a close relationship between the value witness and the stolen property.[23] The second factor relates to stolen property of a unique quality.[24] These factors pose perhaps the most controversial and far-reaching decision in Iowa concerning the issue of valuation of stolen property. No other state appears to have gone so far in reducing the rigidity of the market value rule.

There is little dispute that an owner may testify as to the market value of his stolen property.[25] The *Savage* court stated that the "owner rule" ex-

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15. 288 N.W.2d at 504.

16. *Id.* The supreme court said that the storekeeper's testimony could reasonably have been determined by the trial court to have involved a discussion of market value.

17. 288 N.W.2d at 509-10 (Allbee, J., dissenting). Reynoldson, C.J., and LeGrand, J., joined in the dissent. *See* McCormick, *supra* note 11, at 175 (market value "may be proved by opinion evidence of those who are familiar with the selling prices of such property at the particular time and place"). By contrast, the witness in Savage admitted that he did not know at what price the used railroad cores could be sold. 288 N.W.2d at 509-10 (Allbee, J., dissenting).

18. State v. Boyken, 217 N.W.2d at 221. *But see* City Nat'l Bank v. Jordan, 139 Iowa 499, 504, 117 N.W. 758, 760 ("[m]arket value is not the subject of mathematical or exact measurement or statement, and can be proved only as a matter of opinion or judgement by competent witnesses").

19. 288 N.W.2d at 504.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *See, e.g.*, People v. Paris, 182 Colo. 148, 511 P.2d 893 (1973)(owner's testimony must relate to the present market value of the item at the time that it is stolen); Hall v. State, 20 Md. App. 170, 314 A.2d 704 (1974)(owner need not be expert to testify as to his property's fair

tends to certain non-owners as well, who are competent to testify because of their relationship to the property involved.[26] This result is justified on the grounds that the "presumed competency of an owner arises out of his peculiar knowledge of the 'quality, cost and condition' of the property, rather than actual ownership."[27] Just as an actual owner "might . . . be presumed to be competent to establish value" so may "other persons having the requisite knowledge."[28] The court based its opinion on a number of decisions, including *State v. Boyken*,[29] in which the Iowa Supreme Court held that a store manager was competent to testify as to the wholesale and retail prices of records stolen from his store.[30] Likewise, in *Jeffries v. Snyder*,[31] an individual who had possession of and had used some household goods was allowed to testify as to the stolen goods' value.[32] Non-owner testimony concerning stolen property value has been supported by a number of other states as well.[33] In *Savage*, the storekeeper was familiar with the cost of rebuilt cores through the deliveries and orders he handled.[34] The court indicated that no one would be more knowledgeable than the storekeeper as to the radiator cores' value.[35] Hence, *Savage* proceeds on the valid conclusion that the rules applicable to owner testimony apply to the testimony of competent non-owner witnesses as well. However, the court goes too far in its decision concerning the value testimony of witnesses.

In developing a liberal rule on value testimony, the *Savage* court stated "[t]he general rule is that an owner may testify as to actual value without a showing of general knowledge of market value."[36] The court cited *Boyken* as support[37] where "an owner was competent to testify concerning the value of

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market value); Gilbreath v. State, 555 P.2d 69 (Okla. Crim. App. 1976)(owner familiar with his stolen air conditioner's use and condition may testify on its fair market value). The *Savage* court goes one step further by allowing owner testimony concerning the property's actual value.

26. 288 N.W.2d at 505.

27. *Id.*

28. *Id.*

29. 217 N.W.2d 218 (Iowa 1974).

30. *Id.* at 221.

31. 110 Iowa 359, 81 N.W. 678 (1900)(no special qualification required of a witness who expresses "an opinion as to the value of articles in common domestic use, especially if he owns or has used the same.") *Id.* at 362, 81 N.W. at 679.

32. *Id.*

33. *See, e.g.*, People v. Trujillo, 186 Colo. 329, 527 P.2d 52 (1974)(director of purchasing for hospital was competent to testify as to value of stolen typewriter previously purchased by him); Crum v. Commonwealth, 467 S.W.2d 343 (Ky. 1971)(car owner's wife held to be competent witness concerning value of husband's car); People v. Calhoun, 30 Mich. App. 160, 186 N.W.2d 56 (1971)(railroad supervisor who bought and sold railroad equipment for company was competent witness concerning value of such property).

34. 288 N.W.2d at 503.

35. *Id.* at 505.

36. *Id.* at 504.

37. *Id.* *See* note 29 *supra*.

his property."[38] The court in *Savage* erroneously interpreted the discussion of "value" in *Boyken*[39] to mean "actual value."[40] In *Boyken* the court did not discuss the right to testify to and establish the value of property through other than the market value unless the latter does not exist.[41] Likewise, in *Kohl v. Arp*,[42] which the *Savage* court also cited as authority,[43] it was held that an owner need not be an expert in order to testify as to the reasonable market value of his damaged chattel.[44] As in *Boyken*, no mention was made in *Kohl* of testifying as to actual value without a showing of the lack of a market value. In *City National Bank v. Jordan*,[45] which was also cited by the *Savage* court,[46] "ownership and possession of personalty afford some ground for the presumption of capacity to speak to its (market) value."[47] Despite the absence of authority from prior case law, the *Savage* court eliminated the preliminary step of proving the absence of market value before proceeding to proof and testimony of actual value.

In *Anderson Savings Bank v. Hopkins*,[48] the trial court dismissed the testimony of a stockholder who testified as to the value of similar stock issued by the same corporation.[49] The Iowa Supreme Court affirmed, noting that the stockholder did not show any knowledge of the stock's market value and was giving "mere opinion or conclusion" as to the market value.[50] In *Ryan v. Cooper*,[51] the defendant owner's counterclaim as to the value of his

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38. 217 N.W.2d at 220.

39. 288 N.W.2d at 504 (citing to 217 N.W.2d at 220).

40. 288 N.W.2d at 504. It is somewhat understandable that the court in *Savage* had a difficult time in distinguishing between market value and actual value, since the court has never adequately defined the difference between the two terms. The court in *Boyken* apparently approved the definition of fair market value to be "what a willing buyer would pay a willing seller in the open market place." 217 N.W.2d at 221. However, the problem still remains as to what "actual value" entails in the area of stolen property. The court has never given a clear definition of what "actual value" means—the item's intrinsic value to the owner, the item's original purchase price, etc.—and until the court does so it is likely that Iowa law will remain in a state of confusion in the area of stolen property valuation.

41. 217 N.W.2d at 220-21. In fact, the court in *Boyken* held that the store manager was competent to testify because his testimony was related to the stolen records' *market* value. *Id.* at 221.

42. 236 Iowa 31, 17 N.W.2d 824 (1945).

43. 288 N.W.2d at 504.

44. 236 Iowa at 35, 17 N.W.2d at 826 (owner, who had operated truck and knew what it cost, was competent to testify as to reasonable market value of the truck before and after it was damaged).

45. 139 Iowa 499, 117 N.W. 758 (1908).

46. 288 N.W.2d at 504.

47. 139 Iowa at 505, 117 N.W. at 760 (horse owner testified that horse he sold was worthless on the open market).

48. 195 Iowa 655, 192 N.W. 824 (1923).

49. *Id.* at 657-58, 192 N.W. at 826.

50. *Id.* Likewise, in *Savage* the storekeeper witness admitted to a lack of knowledge as to the radiator cores' market value. 288 N.W.2d at 509-10 (Allbee, J., dissenting).

51. 201 Iowa 220, 205 N.W. 302 (1925).

property was dismissed because he admitted in cross-examination that he had never investigated its present value and only knew what he had paid for it.[52] Other states have also required that owner and non-owner testimony relate only to market value unless it is shown that none exists.[53]

Despite the support for the requirement that owners and non-owners testify only as to market value, if it exists, there is some authority upon which the *Savage* court could have relied in order to bolster their conclusion, including two Iowa cases, *State v. Hardesty*[54] and *State v. Register*.[55] In *Hardesty* the court upheld the testimony of a witness who testified to other than the market value of a stolen hedge clipper.[56] However, the *Hardesty* court noted that there was not a readily determinable market value for the clipper involved.[57] In *Register* the court affirmed the testimony of an antique car owner even though he admitted on cross-examination "that his estimate of value was based on his personal opinion and not on any sales he had observed."[58] Interpreting the case of *State v. Hathaway*,[59] the *Savage* court posited that *Hathaway* held that the "actual value testimony" of a witness was proper even though the witness lacked knowledge of the market value for the stolen goods.[60] However, further inspection of *Hathaway* reveals that the witness was held to possess sufficient knowledge to testify as to the property's *fair market value* and did so testify.[61]

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52. *Id.* at 223-24, 205 N.W. at 303. *Cf.* Latham v. Shipley, 86 Iowa 543, 548-49, 53 N.W. 342, 343 (1892)(individuals who had worked with second-hand ruling machines held competent to testify to other than the fixed market value where there was *no* evidence of an existing, fixed market price).

53. People v. Paris, 182 Colo. 148, ___, 511 P.2d 893, 893-94 (1973)(owner's testimony must relate to value of property at time of theft, not when the goods were purchased); Cofflin v. State, 230 Md. 139, ___, 186 A.2d 216, 219 (1962)(testimony of owner without knowledge of the article's market value and condition may be held inadmissible); State v. Romero, 95 N.J. Super. 482, ___, 231 A.2d 830, 832-33 (1967)(non-owner competent to testify only as to market value or reasonable selling price).

54. 261 Iowa 382, 153 N.W.2d 464 (1967).

55. 253 Iowa 495, 112 N.W.2d 648 (1962).

56. 261 Iowa at 391, 153 N.W.2d at 470.

57. *Id.*

58. 253 Iowa at 499, 112 N.W.2d at 650. The court determined that the car owner's "reasonable experience in the field and knowledge of the particular item" justified his value testimony on the antique cars. *Id.* Nonetheless, in making its argument the *Savage* court failed to cite to *Register* for support.

59. 100 Iowa 225, 69 N.W. 449 (1896).

60. 288 N.W.2d at 504.

61. 100 Iowa at 226, 69 N.W. at 449 (reasonable market value not confined to the price at which clothing stores would buy or sell used wearing apparel). Justice Allbee stated that the trial court in *Savage* also misinterpreted Iowa case law concerning market value. 288 N.W.2d at 509 (dissenting opinion). Justice Allbee noted that the trial court erroneously relied on State v. Strum, 184 Iowa 1165, 169 N.W. 373 (1918), in its decision to allow the storekeeper to testify as to the core's actual value. 288 N.W. 2d at 509 (dissenting opinion). Allbee indicated, *id.*, that even though the *Strum* court allowed the witness to testify as to the original cost, 184 Iowa at 1167, 169 N.W. at 374, there was direct testimony in *Strum* that no market value existed for

In reviewing the relevant case law, one is hard pressed to find much Iowa case support for the *Savage* court's position that a witness may testify as to actual value where he lacks knowledge of market value and where the state fails to show that market value for the property does not exist.

Stronger support for the *Savage* position lies outside the state, as other jurisdictions indicate a willingness to allow owner testimony as to actual value.[62] The Colorado Supreme Court has upheld the testimony of an owner as to the value of his stolen tools even though he did not know what they were worth on the open market.[63] Likewise, the Kansas Supreme Court affirmed the grand larceny conviction of an individual despite the admission by the state's main value witness on cross-examination that he lacked "comprehension" as to "the present day market value of" his stolen property.[64] Most recently, the Washington appellate court held that it was not improper to introduce the testimony of a value witness owner who stated the value for his stolen items but admitted that he did not know for what they could be sold.[65] However, it is unclear from the record of these cases whether testimony was presented to the effect that no ascertainable market value existed for the items. Without any clear and definite support, the correctness of the decision in *Savage* to allow actual value testimony without first showing the lack of any fair market value is clouded at best.

The other value exception or factor developed in *Savage* concerning the alleged propriety of introducing actual value testimony without a prior showing of the absence of market value is also highly questionable. The *Savage* court stated: "specific evidence need not be presented to the court to establish the absence of a market for certain items; the court may, in such cases, assume that no such market value exists."[66] In holding that a court may take judicial notice of the lack of market value for uncommon items,[67] the *Savage* court appears to have gone further than any prior Iowa case as to court acknowledgement of unproven matters of value.[68]

Judicial notice has been defined as a court's right to recognize, on its own motion, "the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the sub-

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the stolen items. *Id.* at 1169, 169 N.W. at 375.

62. *See* notes 63-65 *infra.*

63. Rodriguez v. People, 168 Colo. 190, ___, 450 P.2d 645, 647 (1969)(court rejected defendant's statement that owner's testimony was inadmissible because it was based on the stolen tools' original value when, in fact, the tools were used).

64. State v. Ireton, 193 Kan. 206, ___, 392 P.2d 883, 884-85 (1964)(gun owner knew what he had paid for his stolen guns and placed his own personal value on them).

65. State v. Toliver, 5 Wash. App. 321, ___, 487 P.2d 264, 269 (1971)(owner's testimony on cross examination that he lacked knowledge of the market value of his stolen items "went only to the weight of his testimony, not its prima facie sufficiency").

66. 288 N.W.2d at 506.

67. *Id.*

68. *See* notes 69-72 *infra.*

ject of testimony, or which are universally regarded as established by common notoriety."[69] As initial case support for taking judicial notice of the lack of market value in *Savage*, the court referred[70] to *State v. Theodore*[71] in which the jury, "from their common knowledge and experience" was entitled to determine the value of stolen meat where no direct evidence of such value was presented.[72] In a similar case,[73] the plaintiffs were allowed to prove the intrinsic value of household goods without establishing the absence of the goods' market value.[74] Additionally, the *Savage* court cited[75] *Wright Titus, Inc. v. Swafford*,[76] and quoted the Texas appellate court as saying " 'the court judicially knows that odd pieces of second-hand table silverware do not ordinarily have a market value.' "[77] The *Savage* court concluded from these cases that judicial notice of the absence of market value for radiator cores was proper.[78]

Despite the support for taking notice of the lack of market value for the items mentioned in these cases, they can be distinguished from *Savage*. Justice Allbee pointed out that the *Savage* court's support for judicial notice of a lack of market value involved mainly household goods.[79] Iowa and other state jurisdictions have subjected the valuation of household goods "to less strict proof requirements" than other items.[80] Further, courts have traditionally held that household goods do not have an ascertainable market value[81] and that they must rely on the owner's testimony because of the

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69. State v. Berch, 222 N.W.2d 741, 744 (Iowa 1974). *See also* Motor Club of Iowa v. Department of Transp., 251 N.W.2d 510 (Iowa 1977)(trial court's taking judicial notice of what it perceived as the problems of truck traffic was overruled as not being judicially noticeable).

70. 288 N.W.2d at 506.

71. 260 Iowa 1038, 150 N.W.2d 612 (1967).

72. *Id.* at 1045, 150 N.W.2d at 616. However, as a possible point of distinction from *Savage*, the jury in *Theodore* was apparently taking judicial notice of the property's *fair market value*, not actual value.

73. Niagara Fire Ins. Co. v. Pool, 31 S.W.2d 850 (Tex. Ct. App. 1930).

74. *Id.* at 852 (a family's furnishings generally do not have an ascertainable market value).

75. 288 N.W.2d at 507.

76. 133 S.W.2d 287 (Tex. Ct. App. 1939).

77. 288 N.W.2d at 507 (quoting *Wright Titus, Inc. v. Swafford*, 133 S.W.2d at 296 (introduction of evidence as to intrinsic value of family pictures affirmed)).

78. 288 N.W.2d at 507.

79. 288 N.W.2d at 511 (Allbee, J., dissenting).

80. *Id.*

81. *See, e.g.*, McMahon v. City of Dubuque, 107 Iowa 62, 64, 77 N.W. 517, 517 (1898); Crisp v. Security Nat'l Ins. Co., 369 S.W.2d 326, 328 (Tex. 1963)(it is common practice for courts to hold "that used households goods, clothing and personal effects have no market value in the ordinary meaning of that term" and that actual value is the proper measure for damages); Niagara Fire Ins. Co. v. Pool, 31 S.W.2d 850, 852-53 (Tex. Ct. App. 1930); *Cf.* McCORMICK, *supra* note 11, at 171 (value other than market value is "most frequently . . . resorted to in cases of loss of, or damage to, articles which the plaintiff has acquired for personal or domestic use and not for *business purposes*, such as household goods, clothing, pictures, books, and the like") (emphasis added).

difficulty in procuring evidence as to a secondhand market value for household items.[82] The case law authority for taking judicial notice as to the absence of market value of household goods does not logically justify its extension to railroad cores.[83]

Nonetheless, some courts have held that there are limited markets for such items as telephone cable[84] and transformers.[85] The California appellate court noted in *People v. Renfro* that the plaintiff's stolen telephone cable had a unique or restricted use and an extremely limited market."[86] However, the appellate court noted that there was substantial evidence presented at trial from which the jury could find that the proper value of the stolen cable was its replacement cost.[87] Stronger authority for *Savage's* position that the court may judicially recognize the absence of market value for certain items is found in *State v. Randle,* in which the court stated that electric transformers by their very nature have "no absolute standard by which the market value may be determined" necessitating the introduction of other values such as the replacement cost.[88]

One further roadblock remains despite the reliance of the *Savage* court upon *Randle* and *Renfro* to justify its holding. As pointed out by Justice Allbee,[89] the Iowa Supreme Court has stated that an appellate court generally cannot consider as evidence on appeal, "facts which are known by the judge but are not made a part of the record."[90] Subsequently, the court has refused to judicially recognize the belief that women had achieved equal social and economic status with men—in part because no such evidence of this type was presented before the trial court.[91] Nevertheless, the *Savage* court can draw on *Ross v. United States*[92] for support, in which the Eighth Circuit Court of Appeals took judicial notice on appeal of various characteristics about an envelope within which the social security check was contained.[93] The *Savage* position can also draw on support from Michigan[94] and

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82. *See, e.g.,* Jeffries v. Snyder, 110 Iowa 359, 362, 81 N.W. 678, 679 (1900).

83. 288 N.W.2d at 510-11 (Allbee, J., dissenting).

84. People v. Renfro, 250 Cal. App. 2d 921, ___, 58 Cal. Rptr. 832, 835 (1967).

85. State v. Randle, 2 Ariz. App. 569, ___, 410 P.2d 687, 689 (1966).

86. 250 Cal. App. 2d at ___, 58 Cal. Rptr. at 835.

87. *Id.* The evidence showed that the stolen telephone cable was made to the telephone company's specifications and that there were few manufacturers of such cable in the United States.

88. 2 Ariz. App. at ___, 410 P.2d at 689. The *Randle* court cited to Beasley v. Commonwealth, 339 S.W.2d 179 (Ky. 1960), which held admissible testimony as to the replacement cost of 766 feet of No. 6 insulated gauge, copper wire used by a railroad. *Id.* at 180-81. However, *Beasley* can be distinguished from *Savage* because there was direct testimony in *Beasley* that the used copper wire had "practically no market value." *Id.* at 181.

89. 288 N.W.2d at 510 (Allebee, J., dissenting).

90. Justice Allbee cited In re Brown, 183 N.W.2d 731, 733 (Iowa 1971).

91. In re Marriage of Beeh, 214 N.W.2d 170, 174 (Iowa 1974).

92. 374 F.2d 97 (8th Cir. 1967), *cert. denied,* 389 U.S. 882 (1967).

93. 374 F.2d at 103. Judicial notice taken that a social security check was sent out first

Illinois[95] which allow for judicial notice of facts not recognized at the trial level.[96]

One final concern remains, however, as to the court's having taken judicial notice of the absence of a market value for locomotive radiator cores. Recently, the Massachusetts Supreme Court stated in *Commonwealth v. Kingsbury*[97] that although appellate courts are entitled to take judicial notice of certain matters, "proof of an essential element of a crime should not be supplied by judicial notice taken at the appellate level."[98] In *State v. Hayes*[99] the Nebraska Supreme Court stated that "[t]he value of (allegedly stolen) . . . goods is an essential element of the crime" of larceny and "the evidence must be sufficient to support a finding of the necessary value beyond a reasonable doubt"[100]—to do otherwise would deny a defendant due process of law, as arguably occurred in *Savage*.

When one considers that a defendant convicted of a class "D" felony as compared to an aggravated misdemeanor[101]—which Savage presumably would have been convicted of if the witness's testimony had been dismissed—can be sentenced up to three years more, it becomes highly questionable whether an appellate court can constitutionally decide vital issues of fact, such as value, which were not decided at the trial level.

Although there is some limited support for the court's arguments in *Savage* that the absence of market value need not be proven in order for a witness to testify regarding a good's actual value, and that the court on appeal may take judicial notice for the first time that no market value exists for locomotive radiator cores, the more widespread view derogates the court's decision. A majority of the courts require that the state must prove the absence of market value before proceeding to actual value testimony.[102] Despite the lack of logic and absence of authority for the *Savage* decision,

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class, bore a return address on its envelope and gave written directions on what to do if addressee was deceased. Some question remains, however, as to whether knowledge of this sort is difficult to obtain and subject to dispute as compared to the value of railroad cores.

94. People v. Burt, 89 Mich. App. 293, 279 N.W.2d 299 (1979).

95. People v. Behnke, 41 Ill. App. 3d 276, 353 N.E.2d 684 (1976).

96. 41 Ill. App. 3d at ___, 353 N.E.2d at 688 (judicial notice taken that the Federal Bureau of Narcotics and Dangerous Drugs was United States Government agency established in the Justice Department); 89 Mich. App. at ___, 279 N.W.2d at 301 (judicial notice taken on appeal that no football games were on television as defendant had testified in his alibi).

97. 79 Mass. Adv. Sh. 2149, 393 N.E.2d 391 (1979).

98. *Id.* at ___, 393 N.E.2d at 393-94.

99. 187 Neb. 325, 190 N.W.2d 621 (1971).

100. *Id.* at ___, 190 N.W.2d at 622.

101. A class "D" Felony under IOWA CODE § 902.9 (1979) authorizes the court to sentence a convicted felon for up to five years in prison, while an aggravated misdemeanor under IOWA CODE § 903.1 (1979) entitles the court to sentence a convicted felon for up to two years in prison.

102. *See, e.g.*, State v. Day, 293 A.2d 331 (Me. 1972); Cleveland v. State, 85 Nev. 635, 461 P.2d 48 (1969); Gilbreath v. State, 555 P.2d 69 (Okla. Crim. App. 1976).

Savage is likely to have a significant impact on future Iowa cases concerning issues of valuation; *Savage* may erode the evidentiary standards required in value testimony cases, and hence ease the burden of proof on the prosecution in convicting alleged felons of sterner sentences.

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