To the Bag

The Root of the Thought

To the *Bag*:

It is not often we get an insight into the outside reading of the justices of the Supreme Court. Chief Justice Roberts gives us an insight into what he has been reading in the last sentence of his dissent in *Spears v. United States*, 2009 WL 129044 (2009), when he said, of the haste with which a majority of his colleagues were enlarging the discretion of district judges in sentencing:

> As has been said a plant cannot grow if you constantly yank it out of the ground to see if its roots are healthy.

Philip K. Howard, a well-known advocate for the proposition that "modern law under[mines] our freedom," as described in his new book, *Life Without Lawyers*, concludes his philippic with the observation:

> Plants don't flourish when we pull them up too often to check how their roots are growing.

Howard's observation was not an original thought; he was quoting from Lecture One of the BBC's Reith Lecture, 2002 by Onora O'Neil, President of the British Academy (www.bbc.co.uk/print/radio4/reith2002/lecture1.shtml?print), where she said in her conclusion:

> Plants don't flourish when we pull them up too often to check how their roots are growing: political institutional and professional life too may not go well if we constantly uproot them to demonstrate that everything is transparent and trustworthy.

Since the aphorism has yet to make Google (last visited February 1, 2009), it would have been better had the Chief Justice told us the source.

Avern Cohn
U.S. District Judge
U.S. District Court for the Eastern District of Michigan

THE JUST 'S'

To the *Bag*:

In case no one has called this to your attention already: A federal district judge, using the names of Baltimore Oriole outfielders Markakis and Jones as examples, has written a 259 word footnote discussing whether "an 's' must be added to a name ending in 's' when using the possessive form." In *U.S. v. Dinkins*, 546 F. Supp. 2d 308, 309 n.1 (D. Md. 2008), Judge J. Frederick Motz quotes two style manuals, one stating that the "s'" is mandatory, and the other endorsing a hybrid approach depending upon whether the final "s" in the name is pronounced "s" or "z," and notes that many excellent writers take a third approach that the "s" is not necessary at all. He notes that "The Supreme Court is divided on this important issue," citing *Kansas v. Marsh*, 548 U.S. 163 (2006), in which the three Justices who submitted opinions in that case took three different approaches to the issue. Reading between the lines, it appears that Judge Motz tired of battling his law clerks on the subject. He concluded his footnote: "Presumably, my adoption of the hybrid approach is subject to a deferential standard of review, even by those more classically inclined." (In his opinion, Judge Motz also suppressed evidence obtained during a federal wiretap.)

Clifford S. Fishman
Professor of Law
The Catholic University of America