

## Thinking About Monitoring

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Veronica Root, *Modern-Day Monitorships*, 33 *Yale J. on Reg.* 109 (forthcoming 2016), available at [SSRN](#).

The study of organizational compliance is now proliferating in American law schools. Over the past decade, new courses, new programs, and new scholarship have focused increasing attention on this area. In recognition of the importance of organizational compliance as a free-standing field of inquiry, the American Law Institute has launched the drafting of **Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations**. This project – and the work it inspires – should advance our understanding of a framework for thinking about organizational compliance. Veronica Root’s work on monitorships, including her most recent piece on *Modern-Day Monitorships*, is a meaningful contribution to one piece of that framework.

Much of the existing work on organizational compliance focuses on “gatekeepers,” which reassure the public that a corporation is complying with its obligations. Professor Root has focused her scholarship on the enforcement side, helping us to understand the special role of “monitors,” which enter the scene after a compliance failure is manifest.<sup>1</sup> The role of monitors is to investigate wrongdoing and make recommendations for future compliance. In her most recent article, Root describes “modern-day monitorships” and argues for a more nuanced understanding of these important enforcement institutions.

Professor Root traces the origins of modern-day monitorships to the familiar court-appointed monitors, which go by various names, including “master,” “special master,” “receiver,” or “trustee.” These monitors have been used for many years to assist courts along a range of responsibilities in resolving complex litigation, from fact-finding to the creation and implementation of remedies.

Professor Root contends that the traditional court-ordered monitorships served as the model for a new form of monitorship, deployed by governments or administrative agencies in a context of increased regulatory oversight. The challenge for a government faced with an organizational wrongdoer is to get the organization back on the right path, possibly over a period of many years. According to Professor Root, “In regulatory grey areas, it is often difficult to predetermine a set of mandates that an organizational wrongdoer should follow going forward.” (P. 123.) Thus, the role of monitors changed from “performing rote compliance enforcement” in the wake of a finding of wrongdoing to “assisting in the development of a remediation program.” (*Id.*) Meet the modern-day monitorship, used by courts, government agencies, and (increasingly) private organizations.

While modern-day monitorships can be employed in diverse circumstances, Professor Root describes four core attributes: modern-day monitors are “(i) independent, private outsiders, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuate remediation of the institution’s misconduct, and (iv) provide information to outside actors about the status of the institution’s remediation efforts.” (*Id.*)

The most common modern-day monitorships are for purposes of regulatory enforcement, as described above, but modern-day monitorships often perform functions beyond the development of a remediation program. The modern-day monitor, like a gatekeeper, may lend reputational capital to the wrongdoer, but in this context to facilitate rehabilitation. Or, when acting under a court order, some modern-day monitors may exercise a great deal of discretion in defining and remediating past harms. Professor Root also suggests a public relations benefit (beyond the use of reputational capital) from modern-day monitorships, when the wrongdoer voluntarily hires a monitor and charges the monitor with providing a public accounting of the investigation, along with suggestions for remediation measures.

Among the many legal issues that arise from the widespread use of monitors is that “modern-day monitorships ... lack a technical source of legal authority governing their use.” (P. 142.) (Note that the ALI project is not a “Restatement of the Law,” which would be primarily addressed to courts to clarify established law, but rather a “Principles of the Law,” which is to be primarily addressed to legislatures, administrative agencies, private actors, or courts where there is little established law.) Some commentators have proposed more robust legal framing of monitors, but Professor Root argues that differences in context make the development of overarching principles challenging. More specifically, she discusses the lack of desirability of one-size-fits-all rules for court involvement, transparency, confidentiality, and monitor duties. The bottom line is that “differences amongst monitorships matter when considering common issues of monitorship reform.” (P. 152.)

Professor Root’s examination of monitorships is careful and detailed, and she includes in the final section of her paper several additional considerations that “lawmakers, scholars, and the public should contemplate” as they think about monitorship regulation. (P. 153.) This piece and her [previous work](#) on the monitor-“client” relationship are worthy of close reading by anyone who is interested in advancing his or her thinking about this emerging field.

1. See Veronica Root, *The Monitor-“Client” Relationship*, 100 *Va. L. Rev.* 523 (2014). [?]

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