

The European Probation Rules, Assessment and Risk

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ABSTRACT

This paper examines assessment practice in probation, especially in relation to risk, and considers the challenges posed to current approaches by the European Probation Rules, as well as by some findings from research. Focusing mainly on practice in England and Wales where much contemporary assessment practice is grounded in the principles of the Risk-Needs-Responsivity (RNR) model, the paper considers the strengths and limitations of the approach to assessment that RNR entails. It is argued that actuarialism, which RNR typically favours in relation to risk assessment, severs the crucial link between assessment and management and must therefore be complemented by other perspectives, notably insights from desistance research and the 'Good Lives' model. The importance of relationship, sometimes overlooked by RNR, must be reaffirmed. The predominance of risk in policy can jeopardise other ways of understanding the value of probation work and could turn out to be self-defeating.

Keywords: Assessment; Risk; Probation; European Probation Rules.

THE EUROPEAN PROBATION RULES

The European Probation Rules (Council of Europe 2010a) attempt to found probation work on the principles of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, an ethical commitment shared by the 47 member states of the Council of Europe. The Rules apply the Convention to the particular circumstances of people under the supervision of a probation agency, also setting out how the organisation, policies and practices of the agency should be established to make sure that the agency operates as it should. The Rules and Commentary do set out (in necessarily very general terms) what research has shown to be the most effective ways of working to reduce reoffending, although their first question, perhaps, is not so much *What works?* as *What is right?*. The Rules, then, give priority to a principled consideration of the rights of all involved – of victims and their families, of offenders and their families as well as the rights and interests of the wider community.

The promotion of justice and human rights is the first duty of a criminal justice system, a consideration that has been rather suppressed by preoccupations with *effectiveness*. The distinction between *What works?* and *What is right?*, however, should not be drawn too sharply. After all, the right to be safe from harm – not to be the victim of a crime – is one of

the most basic of all human rights and to the extent that probation practice is effective in reducing crime it advances an ethical objective. The Rules and their associated Explanatory Memorandum or Commentary (Council of Europe 2010b) therefore have quite a lot to say about effective practice and commend to countries ways of practising that research seems to show can contribute to reducing reoffending.

In particular, the Commentary reflects the dominance of the RNR paradigm. There is a weight of evidence that appears to show that practice that focuses on an individual's **R**isk of reoffending, their crime-related¹ **N**eed and their **R**esponsivity (RNR) is most successful in reducing reconviction (see for example Bonta and Andrews 2007; Andrews and Bonta 2010). Although approaches founded on RNR principles were pioneered in Canada and USA, they have been widely taken up in UK and in many other parts of Europe. Much practice development - notably the design of offending behaviour programmes - has subsequently followed these lines.

Yet the Rules and Commentary also reflect other ways of understanding the purposes, values and potential of probation that complement and sometimes challenge RNR. Above all, as we have seen, they try to construct policy and practice on the basis of human rights. They emphasise the centrality of the *professional relationship* in working with offenders. The first Basic Principle of the Rules states: 'Probation agencies shall aim to reduce reoffending *by establishing positive relationships* with offenders' (Council of Europe 2010 #1 – emphasis added). Many agencies – notably the police and the courts – might affirm their commitment to reducing (re)offending: the Rules say that what is distinctive about probation is that it believes that this is best achieved through professional relationships. #1 continues '... in order to supervise ... guide and assist them and to promote their successful social inclusion.'² This commitment to reducing reoffending through social inclusion is also definitive of probation: if the walls of the prison emphatically 'stand for' (at least temporary) exclusion, probation represents the principle that rehabilitation and desistance must include enabling (ex-)offenders to have fair access to the ordinary opportunities and services of civil society.

It is to be noted that this particular emphasis in the Rules receives support from the insights of desistance studies, which foreground the importance of relationships and *social capital* (Ward and Maruna 2007; McNeill and Weaver 2010). The extent to which the RNR and desistance paradigms can be reconciled is beyond the scope of this paper (see Porporino 2010 for a judicious review), but it can be said that relationship and social capital are ideas central to desistance research that have usually been much less prominent in accounts of RNR, with its emphasis on individual changes in thinking, attitudes and behaviour. This shift of emphasis has implications for an understanding of the professional skills and personal qualities needed by those who work with offenders. Notably, effective relationships depend upon (perhaps *are*) 'offender engagement' (see *EuroVista* Volume 2, Number 1 2012 – a special issue on this concept and programmes to enhance it). Central to this is the idea of *emotional literacy* (Knight 2012), which could be defined as the ability to be aware of one's own feelings, the feelings of others and the effects these have, not least their effects on the

¹ Note that the usual term *criminogenic* is avoided here. This word implies that offending is somehow caused by these factors, but all that statistics can establish is a correlation. The causal mechanisms are often complex and mutually influential and the term *criminogenic* begs this question and oversimplifies.

² The omitted words here are *including control where necessary*. This gloss is redundant because within the lexicon of the Council of Europe the term *supervision* already includes *control*.

working relationship. It includes too the ability to work with emotions constructively and to deploy them for therapeutic benefit. Skills deployed without emotional literacy – or without ethical commitment – are at risk of becoming (and being recognised as) no more than manipulative techniques and thus both unethical and ineffective.

ASSESSMENT

As well as inspiring the design of offending behaviour programmes, RNR has also prompted the development of systematic methods of assessment. Assessment used to be undertaken in a manner that depended on the skills, experience and ‘diagnostic’ judgement of individual practitioners - an approach commonly referred to in the literature as ‘clinical’ or ‘person-by-person’ assessment (Kemshall 2007). But RNR, requiring a systematic and dependable means of assessing the risks, needs and responsivity that are to be the focus of intervention, calls for something much more systematic and rigorous. Assessment instruments - forms that guide the practitioner to identify certain variables or risk markers that are known to be correlated with offending and to explore the significance of a specified variety of associated needs – are now widely used (Roberts 2007). In principle, an agency can ensure that all offenders are assessed consistently and reliably. Many of these instruments include an *actuarial* component (Bonta and Wormith 2007; Robinson and Crow 2009), matching the characteristics of an offender against an extensive database to determine the statistical likelihood of reconviction. It is now confidently asserted that some instruments have achieved impressive levels of accuracy and there seems near consensus that actuarial methods are significantly more accurate than clinical ones (Monahan 2004; Andrews and Bonta 2010).

The Rules and Commentary set out some standards for procedures of assessment which may be summarised as:

66. An assessment of offenders shall be made involving a systematic and thorough consideration of the individual case, including risks, positive factors and needs, the interventions required to address these needs and the offenders’ responsiveness to these interventions.

67. Wherever possible, offenders shall be enabled to make an active contribution to the formal assessment. This includes giving due weight to the offenders’ views and personal aspirations, as well as their own personal strengths and responsibility for avoiding further offending.

68. The offenders shall be made aware of the process and outcomes of the assessment.

69. Assessment is a continuing process and its accuracy and relevance shall be periodically reviewed.

70. Assessment is recommended at key points in the period of supervision and periodically in any case.

71. Staff shall be trained to carry out assessments. Where assessment instruments are used, staff shall be trained to understand their potential value and limitations and to use them ‘in support of their professional judgement’.

These Rules may be compared with the RNR specifications for assessment and the claims made for the superiority of actuarial instruments. #66 agrees with RNR that assessment should be systematic and thorough, attending to risks, needs and ‘responsiveness’. But the Rules go further than this and require that attention also be given to positive factors, including an individual’s own views and personal aspirations, as well as their personal strengths and their responsibility for avoiding further offending. This broader view of assessment finds support from the Good Lives Model, which emphasises the value of acknowledging and developing people’s legitimate aspirations (Ward and Brown 2004; Ward and Maruna 2007). Again, principles of motivational enhancement encourage a focus on strengths rather than weaknesses – people are better motivated by ‘approach goals’ (what they can do) than by aversive ones (what they must avoid). While RNR encourages attention to crime-related factors, desistance studies insist also on the significance of factors that, while not necessarily crime-causing, are blocks to the kind of life that will support and sustain pathways out of offending. Furthermore, #66 refers to an assessment of the resources and interventions that probation might deploy – first of all, the individual’s own abilities and resources.

67 and # 68 also insist on the critical importance of attention to the *process* of assessment – not only its findings – and the active and meaningful participation of the individual. This can get overlooked where staff feel pressure to complete a form and the process of ‘offender engagement’ can get suppressed or lost altogether. What is routine business for staff is different and unusual – perhaps even peculiar – for some service users. Language can be mystifying and the individual can be distanced from the process throughout. The Rules are a reminder that the active participation of the offender is essential. The form is in service of the process and is not the most important thing.

#69 and #70 constitute a reminder that people and their circumstances *change*. RNR has never lost sight of this, but its relative neglect of process discourages attention to how change can be identified and interpreted. One of the best known (and apparently most accurate) actuarial instruments is OGRS (Offender Group Reconviction Scale), now in its third version (Howard *et al.* 2009). This generates a probability of reconviction – a percentage score – based on a number of variables. Suppose, for example, in a particular case the score thus generated is 70. This means – *all* this means – is that, of 100 people matched on the relevant variables, 70 will be reconvicted within one year and 30 will not. OGRS cannot say whether *this* person (the person now being assessed) is one of the 70 or one of the 30, how soon or how seriously they may reoffend or, crucially, what might be done to make a difference. Unless this is understood, actuarial scores could lead to defensive precautionary decisions. A score of 70 looks like a high risk and if a decision had to be taken about whether an individual with this score should (say) be recalled to prison, it would take courage to interpret the meaning and limits of this score and not simply acquiesce in a recall. Certainly the score cannot tell us whether the recall will reduce or increase the risk after a period of detention. The factors that determine an OGRS score, moreover, are *static*: apart from age (getting older) and number of convictions, they do not change. OGRS, then, can take no account of improvements (or deteriorations) in attitudes or behaviour or assess the response to interventions. *Actuarial assessments thus detach assessment from case management.*

To meet this shortcoming, instruments have been developed (Roberts 2007), which seek to identify risks that are dynamic and, in principle, susceptible to change. These risk factors are

identified as the focus and target for intervention. This seems to be a mode of assessment that is rigorous and consistent (as person-by-person assessment usually is not), but is also capable of informing subsequent planning and intervention (which purely actuarial methods cannot). The best known of these instruments is the Offender Assessment System (OASys) (Holden 2007; Canton 2011 Chapter 7), which was introduced in part to try to restore the connection between assessment and management. Developed in England and Wales, OASys has been widely exported and adapted to the distinctive circumstances of several countries.³

But there is a conundrum here. The more an instrument depends upon actuarial sources, the more 'accurate' it will be, but the less able to guide practice in individual cases. The more useful an instrument for informing practice, the more it will depend on person-by-person judgements - with all the errors and idiosyncrasies that this entails – and consequently the less 'accurate'. Among the specific criticisms that could be levelled at OASys (and any other instrument of this type) are:

- i. People and their circumstances differ in an indefinite number of ways. Notably, assessment instruments have been said to be *gendered* (Shaw and Hannah-Moffat 2004). The origins and context of offending by women is different from male offending in important ways and their respective crime-related needs – or their pathways to desistance - may not be assumed to be the same (Corston 2007). How well can instruments accommodate diversity?
- ii. An inescapably 'clinical' element in any actuarial scheme is the need to make an individual judgement to determine whether the risk factor is in fact present and to what degree. For example, 'attitude' may be an established risk factor, but there is still the question of determining what the individual's attitude actually is. This can be referred to as the problem of *instantiation*. Moreover, the kinds of problems that offenders identify for themselves bear an uncertain relationship to what practitioners take to be their problems. Nor can many problems be readily captured by a tick, a yes/no or a score.
- iii. An assumption of instruments is that there is a 'right answer', which practitioners and offenders are variably successful in getting. Yet even the most objective factors turn out to be less than straightforward. Being homeless or unemployed seem like relatively 'hard' facts, but there are varying degrees of *having somewhere to live* (from home ownership to being able to sleep at a friend's house) and different levels of employment (from full-time permanent employment to occasional casual work). Other factors – relationships, emotional well-being, thinking – are still less simple matters of fact. The extent to which something is or is seen as a problem is still less a 'fact', varying with the individual's willingness to talk, being unaware or 'well-defended' or ambivalent, their (fluctuating) confidence and motivation, their concern about how to present themselves. Much too depends on the practitioner's skill in eliciting and exploring these matters and the trust they are able to gain. This helps to explain the following point.

³ The hazards of transferring carefully designed instruments from one setting to another should be noted here. For instance, actuarial instruments used to predict rates of reconviction depend upon statistical correlations established in certain countries that may not obtain elsewhere. Bauwens and Snacken (2010) have also drawn attention to what may be called *second-hand transfer* where an instrument already modified (and as it may be compromised or even distorted) has been exported again in that revised form.

- iv. Assessment instruments should be able to demonstrate high levels of inter-rater reliability. In other words, professionals assessing the same individuals should come to substantially the same judgements. But this is far from the case: on some matters, this reliability is quite good, but for others it is no better than moderate, while *low reliability* has been found in the assessment of financial management, alcohol misuse, thinking and behaviour, risk of serious harm (Morton 2009). It seems improbable that this type of discrepancy could be eliminated entirely and quite different assessments could continue to be made on the basis of the same information – which has serious implications for targeting for programmes and levels of supervision.

71 of the European Probation Rules, as we have seen, refers to the potential value and the limitations of assessment instruments. We are now in a position to summarise some of these strengths and shortcomings. Person-by-person assessment is inherently vulnerable to the errors and vagaries of individual practitioners. Actuarial instruments are founded on statistical data and this appears to lend them a rigour and objectivity that redress the shortcomings of person-by-person approaches. Yet the accuracy of actuarial instruments as a predictor lies in the aggregates of large numbers – not in individual cases. They are therefore valuable for research and for managers – who will want to look at these numbers to make sure that resources are being directed where they should be and that programmes are having their intended effects. But they are appreciably less useful for probation staff in individual cases. The tension between the priorities of research and practice are set out in the Table below. Since researchers and policy makers dominate the literature, there seems sometimes to be an assumption that actuarial approaches are in some sense superior to person-by-person ones, but from the point of view of the practitioner their limitations are significant.

Researcher assumptions	What practitioners need
i. assessment is a way of ascertaining facts about people	i. assessment is exploration and negotiation to inform a way of working with the individual
ii. the most important thing is for the assessment to be ‘accurate’	ii. the most important thing is for assessment to guide practice
iii. actuarial assessments are objective and rigorous	iii. actuarial assessment breaks the link between assessment and management
iv. actuarial methods predict quite accurately	iv. assessment is not ‘prediction’ of further offending, but should contribute to prevention

Table One

It is in recognition of the limitations of all assessment instruments that the Rules insist that they be used as a support to professional judgement and not as any kind of replacement. The challenge lies in deciding how different approaches may be deployed in complementary ways so that the limitations of one method can be balanced by the strengths of another.

The third component of RNR is the principle of responsivity, defined as ‘Ensuring that all interventions, programmes and activities with offenders are run in a way which is engaging, encourages full participation and takes account of issues of identity and diversity.’ (Dominey 2007: 270). Consideration of this key principle has often looked first to the idea of ‘learning styles’ (see for example, Chapman and Hough 1998). Yet Dominey’s reference to aspects of identity and diversity implies a much wider conception of responsivity – calling for attention to culture, gender, ability and other considerations that may affect the way in which services should be delivered accessibly and effectively. As McNeill (2012: 20) says, the ‘... distinction between individual and general responsivity (see, for example, Bonta and Andrews, 2010), and the subsequent over-emphasis on the latter, has too often allowed a complex and important principle to be reduced to the generalised injunction: “Employ social learning and cognitive behavioural strategies” (Bonta and Andrews, 2010: 21).’ Despite its critical importance, then – responsivity is the very heart of ‘offender engagement’ - responsivity is not assessed with anything like the same rigour as risk or need: here, offender and practitioner are thrown back on a mode of person-by-person judgement that is considered inadequate to assess risk.

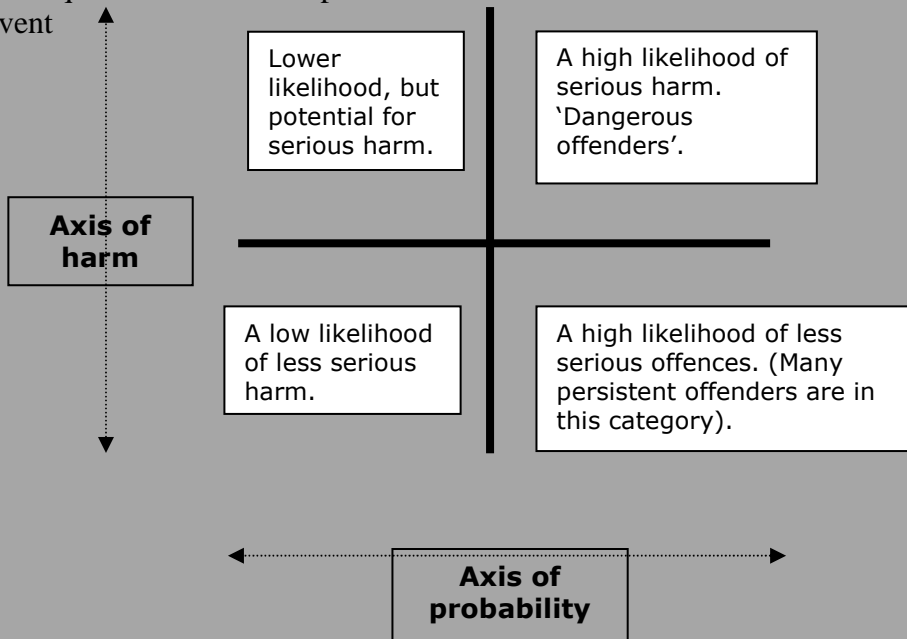
RISK

Among the most conspicuous strengths of assessment instruments is that they bring consistency, rigour and comprehensiveness. At best, they enable the supervisor to focus on the most important things. But attention has also been drawn to some of their limitations and, in the final part of this paper, we move to look at other challenges, especially in relation to the assessment and management of risk.

In many European countries, public protection has become a priority for probation, alongside its more traditional mission of welfare and rehabilitation. Indeed in some countries, notably England and Wales, the assessed level of risk has become the single most influential factor in determining the nature and intensity of intervention that will follow. In that case, the way in which risk is assessed is a matter of central concern to everyone involved in the work of probation.

A key distinction – obscured by expressions like *high risk offenders* – is between the likelihood of reoffending and the harm that might follow. Table Two below illustrates this.

The y (vertical) axis is a scale of *harm / impact*, i.e. the higher on the scale, the more harmful the consequences of the anticipated event



The x (horizontal) axis is a scale of *likelihood*: the further along the line, the more likely.

Table Two

Risk instruments are not very good at assessing the chances of serious harm – at least partly because grave crimes are rare and the actuarial base is therefore hard to establish (Bennett 2008; Tuddenham 2000). It is for this reason that measures put in place to identify and incapacitate the most dangerous (the top right hand box) usually manage to identify less serious, though prolific offenders (bottom right). When actuarial, static factors are complemented by dynamic ones, as we have seen, the usefulness of assessment increases, but its ‘accuracy’ is likely to decline.

The priority of risk in policy discourse has influenced the way in which offending-related needs are understood and the reasons why they are felt to matter. Notably, these needs have been reframed as dynamic *risks* i.e. those offence-related factors that are amenable to change. While there are advantages in expressing the matter in this way, there is reason to pause to ponder the political implications of redefining needs as risks. Bennett puts this well:

‘... the measure of risk includes consideration of issues such as accommodation, education, employment and financial management ... These are factors that draw a link between social exclusion and offending (Social Exclusion Unit, 2002). By embedding these within a structured assessment ... there is an argument that this is entrenching social exclusion within the criminal justice system.’ (Bennett 2008: 10)

Partner agencies in particular should reject attempts to reconstruct social need as risk. They ought to regard the clients they share with the probation service as (for example) unemployed or *homeless people* or *people with special health needs* – not as *offenders*. For them, these are needs that should be met, not risk factors to be reduced. Since these aspects of social inclusion constitute blocks to desistance, a change of focus of this kind – rather than a direct attention to factors thought to be ‘criminogenic’ – would be likely to enhance probation practice and support processes of change. There is an ethical responsibility to recognise the particular vulnerability of certain groups within the criminal justice system and to appreciate the huge levels of disadvantage that characterise prison and probation populations. Probation should affirm its commitment to social justice, not only to retributive and preventive justice (Hudson 1993).

Relatedly, other risks may not always receive sufficient attention in a process that gives priority to reducing reoffending. Specifically, the individual offender’s own vulnerabilities are not indeed neglected, but, as evidenced by the number of relevant questions in assessment instruments, receive less rigorous and systematic attention in the formal processes of assessment enjoined by RNR. Yet the disadvantages and vulnerability of so many offenders should lead us to expect that offenders are themselves significantly at risk. These risks often include vulnerability to crime, ill-health and a considerably higher than average risk of suicide and self-harm (see generally Canton 2011 Chapter 13). Political rhetoric should not be allowed to obscure the obvious point that people may present a risk of reoffending *and also* be vulnerable. A holistic recognition of the circumstances of service users is both an ethical obligation and an aspect of legitimacy, which is known to be associated with compliance (Robinson and McNeill 2008).

It cannot be emphasised too strongly that the purpose of risk assessment is to manage and reduce risk. Statisticians sometimes say that a factor (e.g. uncontrolled drug use) ‘predicts’ offending, but the word prediction is being used in a technical sense here and really means *correlation*. Practitioners do not want to predict crimes; they want to prevent them. And in this respect, risk instruments, as we have seen, have their limitations as well as their strengths. But it is crucial to see that these limitations are not technical, but inherent: no doubt assessment instruments can always be refined, but they can only ever be a resource to support professional judgement.

Among the reasons for this is that actuarial instruments treat risk as a property of individuals. Yet risk is a function of individuals *in* places and circumstances, *at* particular times, *with* other people - offenders and victims - and it is these entirely unpredictable situational contingencies and interpersonal dynamics that lead to serious crimes. It is well established in England that many of the most serious offences committed by people under probation supervision have been by offenders assigned to medium or lower risk categories. This level of assessed risk had meant that the intensity of supervision had been correspondingly medium or low (Craissati and Sindall 2009).

‘... violence is frequently circumstantial: the capacity to predict violence is likely to be limited by the fact that whether an individual is violent or not will depend on a range of circumstances and contingencies, on a particular constellation of events that are themselves hard to predict.’ (Busfield, 2002: 77)

For example, stealing a car can lead to a death; a burglary can turn into a grave assault. Actuarial approaches rightly insist that risk factors should be reliably correlated with offending, but it is often the combination and interaction of these factors that leads to further offending. No assessment instrument can capture this.

Here again, as with the assessment of need and responsivity, emotional literacy is critical. As we have seen, risks *change* and to interpret the meaning of these changes calls for much more than the mere iteration of a series of standardised questions. Here Tuddenham's (2000) concept of *reflexive risk assessment* is valuable. He describes this as '... a dynamic, self-questioning process, which explicitly accepts that knowledge is subject to perpetual revision, and that the wider social and political context has an influence on the practice of risk assessment and management.' (Tuddenham 2000: 174) Assessment is a continuing process, but (re)assessment should be more than a second or third completion of a checklist: it calls for perceptiveness, sensitivity and openness to the possibility of change. In short, it calls for emotional literacy and an appreciation of the way in which the practitioner's emotional responses – including denial and fear – influence their interpretation and assessment of risk. Equally the practitioner must be sensitive to the ways in which the offender's emotions will influence their disclosures. Reflexive risk assessment includes the ability to elicit information – including information that the individual will be reluctant to disclose – that is relevant to a change in the risk they present. Knowing which questions to ask, how to ask them and how to interpret the answers are skills that go beyond the scope of an instrument.

The importance of relationship and offender engagement should now be clear: unless the offender has sufficient trust in their supervisor, they are likely to be very wary about disclosure. And of course it is the offender who is a principal source of information about dynamic factors. To close off this source through inept questioning or heavy-handed monitoring techniques is self-defeating. It may be objected that it is naïve to rely on the offender's accounts in such circumstances. This is true and ways must be found of corroborating their testimony. But the point here is that it is extremely naïve to suppose that people can be effectively supervised against their will and regardless of their attitude towards the risk management approach. The ideal is to 'recruit' the offender to the risk management plan.

As we have seen, then, despite the increased use of standardised instruments, assessment depends on relationship and this applies quite as much to risk – its management as well as its assessment – as to all other aspects of practice. While RNR's most thoughtful proponents fully appreciate this, RNR can be taken (even if mistaken) to entail an understanding of risk that neglects social context and circumstances and leads to stigmatising and exclusionary approaches. In that case, some aspects of RNR approaches may tend to increase rather than to reduce risk.

The value of a positive professional relationship, set out as the first Basic Principle in the European Probation Rules, finds support in the Good Lives and desistance literature (McNeill and Weaver 2010). *Good Lives* is essentially a strengths-based model (Ward and Brown 2004), while all the most widely used assessment instruments, reflecting the priorities of RNR, focus on deficits – risks and needs. Again, motivation, recognised from all theoretical perspectives to be central to enduring change, should be understood as 'something that emerges in and from relationships rather than as a simple attribute of the individual' and this too is an insight that assessment instruments cannot readily accommodate (McNeill and

Weaver 2010: 10). In these respects, Good Lives and desistance theories pose challenges to these instruments.

This paper has focused on the limitations of actuarial risk assessment. But of course all methods of assessment unavoidably have their limitations and limitations only become weaknesses when they are misunderstood or overlooked altogether. At the heart of this critique, however, is the contention that probation is not and cannot be a dispassionate application of instruments and techniques of intervention. Its distinctive contribution to justice, rehabilitation and public protection rests on its appreciation of the value of the professional relationship and its insistence on developing among practitioners the skills and qualities necessary to create, sustain and use these relationships. Whatever human rights requires, it must include a respectful attention to the characteristics and circumstances of the whole person. This gives legitimacy to supervision that is a precondition of effective engagement. In that case, it may turn out that giving priority to *what is right*, rather than a direct pursuit of *what works*, may turn out to be the best possible way of reaching the objectives that modern probation sets for itself.

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