

Disability and Medieval Law

Disability and Medieval Law:
History, Literature, Society

Edited by

Cory James Rushton

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PREFACE

This book began as a series of round table papers at the annual medieval conference held in Leeds. During the book's long journey to completion, the study of medieval disability has gone from a slightly suspicious fringe activity to an increasingly central, vibrant field. It has also become a strangely fractured field, prone to producing studies that always feel like the first study. In one way, this should be expected: disability theory itself has long argued that the field has an interesting, even dynamic, tension between the study of disability as an idea and as a social group, and disability as a category composed of different, sometimes radically different, lived experiences. Attempts to create social or legal policy on a one-size-fits-all model are doomed to failure, just as any grand narrative of the history of medieval disability in the west must be doomed to fail. To that end, a book like this one seems timely: a series of case studies united only by the question of how the Middle Ages dealt with the conflict between personal impairment and the law, case studies which might help colour in some of the many blank areas in our understanding.

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INTRODUCTION: PUNISHMENT AND PITY

CORY JAMES RUSHTON

The English chronicler Matthew Paris tells the story of an assassination attempt aimed at King Henry III, taking place at Woodstock. One detail of the plot concerns us:

On the morrow of the nativity of the Blessed Mary, a certain man at arms, a man of some education, came to the king's court at Woodstock. Pretending to be mad, he said to the king: "Resign to me the kingdom which you have unjustly usurped and long detained." And he added that he had the mark of royalty on his shoulder. When the king's servants ran upon him, intending to beat him and drive him from the king's presence, the king checked them, saying "Let him alone in his folly." But in the middle of the night, the madman climbed into the king's sleeping chamber by the window, a naked knife in his hand, and he came to the king's bed.¹

Fortunately, "by the providence of God the king was with the queen" and the assassination attempt failed; it seems that God does indeed move in mysterious ways. Under torture, the would-be assassin confessed that he was an agent of the de Marisco family of Lundy Island, who were in a land dispute with the king. Here, madness does not play the problematic role it does in legal cases today, as a defence which ameliorates or excuses what would otherwise be a crime. Instead, the assassin feigns madness to gain access to the castle at Woodstock, a heavily protected space. That madness further gains him a privileged proximity to the body of the sovereign, his target. Further the text adopts the man's own position in its vocabulary: when he sneaks into the king's private room, he is not "man at arms" (what we might see as his reality) but "madman" (his pretence). Perhaps the text does confirm a kind of madness, linked to the insane act of trying to kill a monarch placed on his throne by God. To perform or attempt to perform madness is to actually be mad, whether we would read this as "madness" or not. Gerd Althoff argues that royal anger (*ira regis*), when it appears in medieval texts, is no sure indication of a king's actual state of mind. The monarch puts anger on like a cloak when it suits his purposes.²

It would seem possible, then, that the act is genuinely mad, but the individual (in this case, a would-be assassin) is “mad” only when committing that act.

On the other hand, there is love: which often appears in contemporary texts as an outside force, something which attacks the mind, soul, and body. Indeed, love could be considered madness or to at least prompt madness across a wide variety of texts ranging from medical tracts (the *Viaticum* of *Constantine Africanus*, a gloss on that work by Gerardus Biturcensis, and Avicenna’s *Canon medicinae*) to vernacular romances. Far from being a metaphor for romantic feeling, lovesickness was considered a real medical problem for which real medical solutions were proposed: in most cases, sex with the beloved was best, but sex with someone else – even sex the sufferer paid to have – would do the trick. In other words, an emotion read as a temporary disability was to be cured by breaking social and ecclesiastical injunctions on non-marital sex. (Our more secular age has redefined lovesickness as a virtue, and in the west we still discuss love with the language of medieval medicine.) Henry’s mercy towards an apparently insane attacker testifies to an understanding that madness could justify solutions which circumvent the normal working of the law, just as lovesickness could. Like a modern society, however, determining if a case of madness was real or feigned was very much a central concern for the law.

The would-be assassin’s true position comes out only when the right questions are asked at the point where his body is being broken: where modern jurisprudence tends to see torture as illegitimate and ineffective, medieval criminal investigation sees it as partially restorative and partially demonstrative (in that it demonstrated the ways in which law was to be considered real). Torture breaks one body to heal the greater social body. This argument is a familiar one after the work of Elaine Scarry in *The Body in Pain*, subtitled “The making and unmaking of the world.” Scarry writes that “Torture ... consists of a primary physical act, the infliction of pain, and a primary verbal act, the interrogation.” The world disappears for the victim of torture, replaced by the torturer’s question.³ This does not at first appear to sufficiently account for the public role of torture in pre-modern societies, as discussed by Michel Foucault, where it is linked to issues of sovereignty and the display of power, but also to the act of confession itself: “When it is not spontaneous or dictated by some internal imperative, the confession is wrung from a person by violence or threat; it is driven from its hiding place in the soul, or extracted from the body. Since the Middle Ages, torture has accompanied it like a shadow, and supported it when it could go no further: the dark twins”.⁴

With both Foucault and Scarry in mind, Matthew Paris's story of the broken assassin is both public, in that it is communicated to the people through chronicle, and verbal, in that his identity (not-mad or no-longer-mad) is fixed by the act of torture.⁵ In the sequel to these events, the leader of the *de Mariscos* is captured, put on trial, and publically tortured to death. An illustration in the manuscript shows this latter man being dragged by horse to his own execution, obviously a highly-public event which impressed itself on the maker of the manuscript as an important historical and social moment.

This preamble will not surprise many readers: the Middle Ages provide us with a record of many cruelties, enough that the era has become synonymous with barbarity in the public mind. At the same time, many medievalists will be alarmed or perhaps annoyed. The discipline has struggled, perhaps not universally, to change some of these negative perceptions of the various societies that comprised the medieval European world. To begin a discussion of medieval disability with a story in which one of the most successful monarchs of the age presides over the torture and execution of his enemies is to risk confirming a simplistic perception of the era, a perception which the study of historical disability has been largely content to absorb and continue. It is about to get worse before it gets better, though, for the other part of Paris's story worth attending is the casual acceptance of a small but crucial detail: when the assassin first approaches the king, his aggressive accusation of usurpation is met with a near-beating. Only the king's intervention saves the man – not only saves him, but leaves him within the walls of the royal residence, near to Henry's body. The king's pity for a perceived mental illness endangers his own life: the assassin relied upon the king's kindness to further his own goals. A king will feel pity: indeed, as Chaucer's narrators often say, "Pity runneth soon in gentle heart." The assassin has reason to expect that this feint would get him closer to his goal, because kings must appear merciful when the situation calls for it.

The standard reading of the medieval era is thus that it was cruel, but it was also Christian and subject to medieval Catholic doctrine concerning charity and pity. Disability, mental/intellectual or otherwise, would seem a likely target for the *caritas* or love enjoined on all members of the Church community at least as often as it was the result of medieval jurisprudence. The poor could expect hand-outs at the kitchen doors of both castle and monastery, and we can assume there were many disabled individuals within these ranks (although it is important to heed the warning of Henri-Jacques Stiker that the disabled would not "simply melt into the crowd of the poor", that they would have a presence in medieval society even if we

have trouble delineating that presence as closely as we would like).⁶ More than this, disability historiography has long considered the feudal era one in which the disabled could make a greater contribution to economic society than they have since the Industrial Revolution, with its specialized and increasingly complex jobs: as Michael Oliver influentially argues, medieval economics were agricultural and small scale-industrial and “did not preclude the great majority of disabled people from participating in the production process, and even where they could not participate fully, they were still able to make a contribution”.⁷ This is important, but it can also be overstated, as Winzer has argued: “In the thousands of years of human existence before 1800, life for most exceptional people seems to have been a series of unmitigated hardships. The great majority of disabled persons had no occupation, no source of income, limited social interaction, and little religious comfort... Their lives were severely limited by widely held beliefs and superstitions that justified the pervasive prejudice and callous treatment. Individuals seen as different were destroyed, exorcised, ignored, exiled, exploited—or set apart because some were even considered divine.”⁸ It is perhaps best to understand disability in the medieval period as being just as complex and variable as it is today.

The medieval impaired individual, then, was not universally marginalized nor permanently on the wrong side of an able-bodied/disabled line: the flexibility of medieval ideas of time and labour, limited only by the seasons and by the natural rhythms of the day, meant that in practical everyday terms “ability” was seen on a spectrum. The law, however, is a different story. In legal matters, ability – to understand the charges against one, to make rational decisions regarding one’s goods, to control one’s emotions – really did matter, and medieval authorities were not dissimilar from modern authorities when it comes to drawing a strict line between competence and incompetence in legal matters. In William Langland’s fourteenth century social satire *Piers Plowman*, the issue of disability comes to the fore during an episode in which various allegorical figures represent society coming together to support itself. Among the individuals who try to take without giving are “faytours” (idlers), who pretend to be disabled: they “leyde here legges alery, as such lorelles conneth” and claim to be unable to work (VIII.128-29). The presiding allegorical figure, Piers the Plowman, claims that anyone who refuses to work will be forced to eat barley-bread and drink brook water (VIII.141-42). But he insists on a privileged space for those who really are “blynde or broke-legged or bolted with yren” (the last phrase meaning they wear leg-braces to help them walk) will have their physical needs met (VIII.143-48; he also places those who pray, friars and hermits, in the

same category). This scene is an allegorical representation of the ideal earthly society, one in which the able-bodied have a social obligation to assist those who cannot fend for themselves. When this injunction does not work, Piers asks a knight to enforce – legally and through force of arms – the rule that only those who are willing to work will be allowed to eat (VIII.157-60).⁹ The social becomes the legal very quickly, and the poem at least opens up the possibility that part of legal enforcement would be to differentiate and determine who is disabled and who is not.¹⁰

Indeed, “disability” and “disablement” have always been terms describing the legal as much as the social: Simi Linton reminds us that *Stedman’s Medical Dictionary* defined disability in 1976 as a “medicolegal term signifying loss of function and earning power.”¹¹ For the purposes of this introduction, I will begin with what is by now a key distinction, common enough across Disability Studies to be considered standard: *impairment* is any loss or abnormality of psychological, physiological, or anatomical structure or function; *disability* is any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being; *handicap* is a disadvantage for a given individual, resulting from impairment or disability, that limits or prevents the fulfilment of a role that is normal, depending on age, sex, social and cultural factors, for that individual.¹² There are problems with these definitions, not least of which are the core concept of ‘normality’, and the further difficulty of determining the norms for medieval culture. Disability Theory’s key distinction is between impairment (“the biological ‘fact’, the bodily manifestation”, as Metzler puts it)¹³ and disability, socially-constructed disadvantages justified by perceived insufficiency of body or mind, which will differ from society to society and change over time.¹⁴ Metzler is helpful here: “Or to put it another way, a ‘cripple’ in the thirteenth century could share the same physiological condition with a ‘cripple’ in the later twentieth century, yet the scientific, medical or biological discourse of each time would already describe each body, though outwardly manifesting the same symptoms, in different ways.”¹⁵ A volume such as the present one, concerned with the law’s relationship with impairment, is almost by definition deeply concerned with the social model of disability. The law, rooted in large questions about society and sovereignty and in concerns about who has access to authority and in what measure, both runs up against and potentially braces itself in notions of normality/normativity and abnormality. While law is always admittedly ideological, it is at least at some basic level concerned with the actual physical bodies and minds of actual physical people.

In the first issue of the theory/medieval culture journal *postmedieval*, dedicated to the posthuman, Julie Singer wonders whether there can be a “premodern posthuman”, whether Disability Studies could help “take us from the sub- to the posthuman”.¹⁶ She acknowledges that the “activist strain” is reluctant to see itself as a “critical movement that interrogates the fringes and limits of human experience” given its “commitment to the destigmatization of disability” – in other words, their reluctance to declare disability one of the fringes of human experience, instead pursuing accessibility of various kinds. Borrowing from Donna Haraway, Singer argues for an opening of the boundaries, a push to extend the human beyond the traditional idea of the normal, organized around a series of dichotomies: male/female, able-bodied/disabled, etc. Singer’s impulse – that the medieval disabled were “neither post-, para- nor subhuman”, that they are something both “undeniably human” and “*something else*” – is exciting and attractive. However, some caution is required. Tobin Siebers explains the limits of Haraway’s “justly famous theory of the cyborg vis-à-vis actual impaired bodies”, and is worth quoting here at length:

Haraway’s cyborgs are spunky, irreverent, and sexy; they accept with glee the ability to transgress old boundaries between machine and animal, male and female, and mind and body. They supposedly make up a future, fortunate race, but in fact they exist everywhere today. Our cyborgs are people with disabilities, and Haraway does not shy away from the comparison. Severe disability is her strongest example of complex hybridization ... Moreover, she views the prosthetic device as a fundamental category for preparing the self and body to meet the demands of the information age. “Prosthesis is semiosis,” she explains, “the making of meanings and bodies, not for transcendence but for power-charged communication” (244). Haraway is so preoccupied with power and ability that she forgets what disability is. Prostheses always increase the cyborg’s abilities; they are a source only of new powers, never of problems. The cyborg is always more than human – and never risks to be seen as subhuman. To put it simply, the cyborg is not disabled.¹⁷

In other words, for Haraway and Singer the disabled body or mind is full of potential, each unique individual pointing to a society in which difference is the norm. There would be no “able” to be troubled. The law, however, starts to look like a polar opposite, dedicated as it is to strict definitions and a firm binary of legal/illegal. A completely flexible law would be no law at all: it would be anarchy. Medieval thinkers knew this. Psalm 85 suggests through prophecy the difficulties of reconciling mercy and truth, righteousness and peace (Ps 85:10), a paradox that manifests itself in the dance of the daughters of God in texts like *Piers Plowman*

(XX:459-68), a dance predicated on the mystery of Christ's incarnation and sacrifice. The irreconcilable conflict God's perfect justice (we all deserve our doom) and God's perfect mercy (we can all be rescued) could only be solved through metaphor in this world. Medieval law struggles with precisely this conflict, but disability troubles this by calling for more mercy (or pity) than most might deserve, even as individual actions remain fully punishable.

The connection between disability and law/politics is explicit in the Middle Ages, and in subsequent eras, in the metaphor of the body politic. The best early formulation of this idea comes in the *Poliraticus* of John of Salisbury (who claims to derive it from Plutarch: "For the republic is, just as Plutarch declares, a sort of body which is animated by the grant of divine reward and which is driven by the command of the highest equity and ruled by a sort of rational management."¹⁸ The body metaphor is quite explicit:

The position of the head in the republic is occupied, however, by a prince subject only to God and to those who act in His place on earth, inasmuch as in the human body the head is stimulated and ruled by the soul. The place of the heart is occupied by the senate, from which proceeds the beginning of good and bad works. The duties of the ears, eyes and mouth are claimed by the judges and governors of provinces. The hands coincide with officials and soldiers. Those who always assist the prince are comparable to the flanks. Treasurers and record keepers (I speak not of those who supervise prisoners, but of the counts of the Exchequer) resemble the shape of the stomach and intestines; these, if they accumulate with great avidity and tenaciously preserve their accumulation, engender innumerable and incurable diseases so that their infection threatens to ruin the whole body. Furthermore, the feet coincide with peasants perpetually bound to the soil, for whom it is all the more necessary that the head take precautions, in that they more often meet with accidents while they walk the earth in bodily subservience; and those who erect, sustain and move forward the mass of the whole body are justly owed shelter and support. Remove from the fittest body the aid of the feet; it does not proceed under its own power, but either crawls shamefully, uselessly and offensively on its hands or else is moved with the assistance of brute animals.¹⁹

This so-called organic metaphor is an argument for cohesion and, perhaps strangely given the importance of the head, an argument against hierarchy as society's only organizing principle, as Cary Nederman suggests: "At the center of this analogy is an attempt to construct civil order on the principle of the social division of labor while rejecting the strictly hierarchical values of the Platonic *polis*."²⁰ Despite the apparently independent wills of the various parts of the body, the physical whole is governed by rationality

and self-interest; if any part is removed, the social body is effectively disabled. Christine de Pizan makes this clear in her early 15th-century *Book of the Body Politic*, where she describes society as “one living body, perfect and healthy”: “For just as the human body is not whole, but defective and deformed when it lacks any of its members, so the body politic cannot be perfect, whole, nor healthy if all the estates of which we speak are not well joined and united together.”²¹ A society so deeply invested in the body as metaphor for the human world cannot help but be similarly obsessed with bodily perfection, with the individual bodies which make up the social classes which in turn make up the whole social body. The centrality of the Aristotelian ideal of the mean ensured that normality was the centerpoint between extremes of deficiency and excess at the macro and micro levels.

Our understanding of the medieval social model of disability thus must also cope with the all-consuming popularity of the ubiquitous ‘Monster Theory’, popularized by the work of Jerome Jeffrey Cohen.²² Monster Theory purports to examine the human and the marginal in medieval culture by focusing critical attention on the monsters found in medieval travel narrative and romance: these include the dog-headed people, giants, and so on. According to David Williams, for Isidore of Seville “monstrosity is constituted in one of the following ways: (1) hypertrophy of the body, (2) atrophy of the body, (3) excrescence of bodily parts, (4) superfluity of bodily parts, (5) deprivation of parts, (6) mixture of human and animal parts, (7) animal births by human women, (8) mislocation of organs or parts in the body, (9) disturbed growth (being born old), (10) composite beings, (11) hermaphrodites, (12) monstrous races”.²³ Most of these categories could encompass modern notions of disability: the loss or abnormal size of bodily parts, birth defects which result in premature aging, or even physical features which might be interpreted as ‘animal’. In effect, the monstrous races of medieval manuscript tradition help bolster Singer’s call for the posthuman: if medieval thinkers could handle the idea of radical variability among sentient populations, why can’t we?

While Monster Theory points to an essential dichotomy between the human and the monster, arguing that the latter polices the boundaries of the former, Disability Theory has been to make inroads by pointing to a spectrum in which the disabled were seen to exist somewhere between the fully human and the fully monstrous. The dog-headed men had souls which could be saved; so could Jewish men, but they menstruated as a sign of their monstrous difference (at least as early as Jacques de Vitry). The medieval human was partially conceived as being on a scale, albeit one complicated by the one-sex model which postulated that women were

simply imperfect manifestations of maleness.²⁴ It is as though Erving Goffman's three stigma types – physical deformities, character traits that a society considers problematic (which might include homosexuality in many historical contexts), and the “tribal” troika of race, ethnicity, and religion²⁵ – do not fully obtain in the medieval period, when the first and third types are so elided as to be indistinguishable. Further, gender would almost certainly count as a potential stigma for medieval law, as women lacked a number of key legal rights. The question of what constitutes either a disability or an impairment is difficult enough in our own culture, especially given a wide variation in what is considered problematic across both time and cultures.

A prime example of the less-than-humanness of women under medieval law comes from the Old French romance *Silence*, in which an English king has banned women from inheriting land; a couple who have only a daughter conspire to get around a law which the text itself seems to suggest is unjust. With their daughter, Nature has created the perfect girl. Nature's arch-rival Nurture is credited, allegorically, with some success: the girl is raised as a boy by her parents, largely so she can inherit their property. But Nurture herself seems to know she has pulled something off: “I have succeeded very well / in turning a noble child into a defective male.”²⁶ *Silence* him/herself echoes this later, debating whether to continue as a male or not: “I don't want to lose my high position; / I don't want to exchange it for a lesser ...”²⁷ The tension between defectiveness on the one hand (she is not really male) and being lesser (the appearance itself is more powerful than her actual reality) speaks to disability directly: *Silence* effectively mines this territory by suggesting that male clothes are what Mitchell and Snyder call “narrative prosthesis”, defined as the way in which deviant bodies become that on which “literary narratives lean for their representational power, disruptive potentiality, and analytical insight. Bodies show up in stories as dynamic entities that resist or refuse the cultural scripts assigned to them.” *Silence* complicates this because his body is in one sense not deviant at all: Nature made her perfect, albeit a perfect specimen of the female, but *Silence* continues to make himself through the adoption of male clothing and behaviors: in other words, through the prosthetic, correcting as much as possible those physical aspects which threaten to undermine the behavioural aspects of *Silence*. What makes *Silence* so powerful in modern culture is that it flirts with refusing to accept easy categorization of either gender hierarchy or deviance, which is not the same thing as saying it does not ultimately embrace those categories: *Silence* clearly seems to raise questions in the expectation of shutting them down, but this closure seems impossible to

achieve in the 21st century. Indeed, we rightly delight in those questions. The text uses male and female pronouns to describe Silence as Silence imagines him/herself at any given time. Just as Matthew Paris' would-be assassin "is" a madman while he feigns madness, so Silence is whichever gender he or she claims at any given textual moment, the performance trumping essentialism, if only temporarily. It is of some interest that at one point, Silence is in double-disguise, first as a boy and then as a peasant; at that point, "Nature's color becomes apparent" and the peasant disguise fails in a way that the gender disguise does not.²⁸ Peasants, too, are socially and legally disabled, but (and?) may actually be closer to the monstrous somehow.

Once physical difference, wherever it is located, is admitted as making one less-than-human, disability pushes one closer to the monstrous and away from the human. This does not mean that medieval society was not capable of assisting disabled people or feeling sympathy, but it does sound a warning that, at the very least, disabled persons in the Middle Ages could expect to lose access to many things their still-fully human contemporaries expected as a matter of course (what we would call basic human rights). If medieval law helped to form the modern individual – and increasingly most studies claim that it did – then how the law defined madness, or the human, or social responsibility, would seem to matter. As Rosemary Garland Thomson writes, "Disability is the unorthodox made flesh, refusing to be normalized, neutralized, or homogenized."²⁹ The law is intended to protect the political and the social, to maintain some ideal society: "For the national body to become increasingly 'coherent,' citizens must begin to recognize themselves as either contributors to or detractors from the overall health of the body politic."³⁰ This could happen even to high-ranking individuals: a strong case can be made that the Wars of the Roses are essentially a response to the disabling catatonia suffered by King Henry VI, a case in which society had to accommodate not the individual but a serious challenge to its norms. It was better to have a usurping monarch than to continue forward with a sharp absence at the centre of society, a political body without a functioning head.³¹

Medieval law would agree that the disabled are not simply human but something else: they are metaphor, in large part because their full humanity is itself in question. As Titchkosky says, "One meaning constituted today is that disability is the metaphor of choice to express problems, while often disappearing from the social landscape as a form of human existence."³² Susan Sontag's insistence that "illness is *not* a metaphor, and that the most truthful way of regarding illness – and the healthiest way of being ill – is one most purified of, most resistant to,

metaphoric thinking”, has only been fitfully heeded; witness the controversy around, and even the need for, Barbara Ehrenreich’s *Bright-Sided: How Positive Thinking is Undermining America*, an investigation that confirms, through a look at modern America, that Sontag was right to note how happiness was and still is seen to be an effective ward against illness (and was even as far back as the sixteenth century).³³

One of the most challenging recent developments in medieval disability studies therefore concerns what to do with the old notion that disability and illness were written on the human body so that they could be read, with obvious implications for the law: leprosy for lust, madness for pride. Tory Vandeventer Pearman’s *Women and Disability in Medieval Literature* notes that Edward Wheatley “finds that medieval notions of disability were tied to the linking of inward sin with outward appearance” (which should surprise nobody) but that recent scholarship has often tried to “rescue” the Middle Ages from assumptions that construe medieval society as intolerant of and even cruel toward people with physical and mental impairment.”³⁴ No lesser a light than the Venerable Bede would appear to disagree with Wheatley, but actually seems to confirm the point. Speaking of the blind patriarch Tobit in the apocryphal book named for him, Bede says this of his blindness:

Do not be surprised, reader, that sometimes, typologically speaking, men’s good deeds have a bad meaning and their bad deeds a good meaning; that *God is light* would never have been written in black ink but always in bright gold if this were not permissible; but even should you write the name of the devil in pure white chalk, it still means deep darkness.³⁵

If bodies are to be read for the meanings of their illnesses and pain, then they are read typologically just as Tobit is to be read; and that meaning will not always be the obvious one. In fact Metzler notes that Bede believed that illness could have a variety of meanings, one of which is that an illness might not have a meaning at all.³⁶

Augustine noted that infants could be differently-abled than their parents: “But who could enumerate all the human births that have widely differed from their ascertained parents?” His conclusion is that all such babies, whether they have “one eye in the middle of their forehead” or have “their eyes in their shoulders”, they remain rational and mortal descendants of a single ancestor: therefore, human. Even here, though, there’s a lesson to be learned from the oddness of individual disabilities: that Adam is our mutual ancestor, and the account of human creation in *Genesis* is true. Human diversity of ability is a celebration and confirmation of God’s ability to see and account for “the similarities and

diversities which can contribute to the whole.”³⁷ Tim Stainton argues further that Augustine’s influential thinking does suggest that particular disabilities could be interpreted in a variety of ways:

The ideas of grace and the ‘divine plan’, while opening up a limited space for acceptance and broad equality in the eyes of God, also reinforced and legitimated an inferior and despised position in this world, leaving those who were considered to have an intellectual disability on the margin of social life and subject to a charity ultimately undertaken for the salvation of the giver, rather than for the welfare of the recipient.³⁸

Still, the default position appears to have been the legibility of illness and injury, the commonly understood metaphor provided by the physical body which pointed to interior or divine truths. Metzler discusses the important example of Gospel of John 9, in which a man blind from birth is healed by Christ’s miraculous intervention. Asked which was the sinning party – the man or his parents – Christ says it was neither. The man was blind for the purposes of the public healing itself, exactly to make explicit the greatness of God. Even if a disability said nothing about the person, it still said something about the natural and supernatural worlds. Indeed, disability was a place in which the two levels of existence met and interacted in telling and sometimes spectacular ways.

V. A. Kolve noted how the shepherd’s talk of sheep diseases, in the Chester cycle of biblical plays, functioned as metaphors for the soul, and were not simply “a comic exploration of the obsessive way in which simple men talk about the thing they know best.” Rather, the shepherds set up a metaphor in which they provide healing for their flocks just as Christ provides spiritual healing for his flock (which includes the shepherds themselves).³⁹ This healing, Jeremy J. Citrome argues, is of a higher order than human healing, particularly as the latter is manifested in invasive surgical practice. Surgery was seen ambivalently through much of the Middle Ages, “the last possible resort in a threefold hierarchy of healing strategies”: diet/regimen, medicine, and then surgery.⁴⁰ Citrome notes that to “a medieval patient, illness and its subsequent treatment must have seemed like a microcosm of Original Sin and its treatment through the intervention of Christ. At the simplest level, successful surgery depended on the presence of divine grace”.⁴¹ Further and significantly, “With the coming of Christ, sickness can be healed without the violence of surgery. Where God before had severed putrefied members of humanity, such putrefaction can be transformed with Christ.”⁴² In other words, surgery was an imperfect course of action both within the medical world and insofar as it could only imperfectly approximate complete healing.

Further, surgery (as practiced in the Middle Ages) tended towards the expulsion of parts (putrefied limbs, excess blood), as opposed to the body of the Church which was capable of healing its parts in a new way in contrast to God's severing of whole populations in events like the Flood (although the Church, too, expelled diseased parts). Medicine was not a way of perfecting the world, but an accidental symbol of how far it was fallen.

What seems clear is that the Middle Ages had the same confusing and sometimes contradictory approaches to physical difference and disability as modern societies, albeit with the tensions located in sometimes very different places. Medical practitioners had a strong tendency in the medieval period to promise full cures, not simply treatment of any given condition, raising at least one question for Sara Butler: "It is difficult to understand why medical professionals undermined their own credibility and risked losing their wages by making everything contingent on a cure."⁴³ Part of the answer might be that the medieval attitude to illness was itself all or nothing: imperfect was imperfect, and the restoration of health was so closely linked to restoring something in the world as to be invisible to the medieval mind. (And besides, the maircalous was always a possibility). To look at specific examples of medieval law as a cultural space which must make precise and specific decisions governing who can or cannot make oaths or testify, how a legal sentence should be written on the body and to what extent, will help sort out these areas of confusion. For Augustine, all political power was flawed in a similar way: "...political structures of power are wholly a postlapsarian and not a prelapsarian development, and since they rely on coercive measure to meet their goal, they are especially vulnerable to the divisiveness and inequities resulting from the fall."⁴⁴ The law was prosthetic, restoring or attempting to restore a fallen world, a world that was once perfect (and would one day be remade perfectly): "God did not create out of any need, nor to perfect any deficiency in himself (*Conf.* 13.4.5)."⁴⁵ The law is both practical and limited, very much of the world *sub aeternitas*. Medieval society sometimes understood disability to be symbolic, and I argue here that in some fundamental way, medieval society knew that its law was also symbolic: punishment and restitution do not actually restore anything, but instead temporarily recreate a vision of social stability or justice (the sense of qualification here is intentional). Law shares this with medicine: the human body is inherently flawed across class, gender and race; so too is the damaged world in which that body finds itself. The world was disabled by an apple, and law must deal with the various disabilities that arise as a result of that great crippling act.

About the volume

To conclude, Disability Theory has been making its presence known in traditional disciplines for several years; Medieval Studies is no exception. While it is possible to find and explicate instances of disability in medieval literary texts and historical chronicles, these findings often seem isolated and thin: like the literature of all ages, medieval literature often turns away from physical imperfection except to make moralistic judgment or engage in sentimental paternalization. Medieval legislation and jurisprudence, however, had to engage with the reality of disability: how variations from the physical norm affected the regular unfolding of the law, how disabilities resulting from violence could or should be compensated, which “imperfections” could bar a person from particular professions (or, sometimes, open some professions to that person). This collection draws on scholars from a variety of disciplines to delineate the relationship between law, government and society on the one hand, and the able-bodied and disabled individuals within society on the other. Any collection of this kind risks appearing diffuse, but the other side of this risk is to seem to reinvent the wheel: the work of Metzler, Turner, Wheatley, Josh Eylar and others has effectively laid the groundwork and set out the controversies. The work at this moment is to collect examples of historical cases, literary figures, and theological debates which will help elucidate and modify that groundwork, and contribute to answering those controversies. The current volume does not aspire to be a full discussion of the links between medieval law and medieval understanding of disability, but rather aspires to advancing the conversation(s).

The volume is intended to be accessible to specialists in a number of fields, drawing on the interdisciplinary nature of Medieval Studies to provide a comprehensive view of its subject; it is not intended as a complete overview of the complicated issues of disability and law in the Middle Ages. This volume is best seen as comprised of case studies: models for how the field might go about looking at both new issues raised by Disability Studies (Philomela’s muteness and Chaucer’s pity) and old issues newly problematized (the last days of Francis of Assisi, Margery Kempe’s roaring). The volume is divided into two equal parts, reflecting the major ways in which law dealt with issues of disability: Punishment and Pity.

The collection begins with Metzler’s examination of disability as it appears in the legal codes formative early medieval period, down to roughly 1300. Metzler finds that these early texts are concerned with “three aspects of physical disability”: the restriction of impaired persons

from public life, the extension of certain rights to impaired persons which able-bodied persons do not have, and the issue of compensation for impairment. Metzler confirms that disability had a wider social definition in the period: women, in a fundamental way, could not be legally impaired because they could not lose rights they never had; Visigothic law seems to confirm that to be asleep was to be “temporarily incapacitated.” Dwarfs and the mobility-impaired could not inherit because they could not fulfil the military obligations which came with land. What emerges from Metzler’s careful work, and the charts which accompany the chapter, is the lack of any “umbrella notion such as our modern term ‘disability’”, although she does find a significant difference between the exclusionary character of Roman law and the compensation model of the Germanic law codes.

Amanda Hopkins explores the deliberately-disabling policy of physical mutilation, noting that mutilating someone rather than imprisoning or executing them could “preserve some measure of the offender’s economic value to society.” Hopkins emphasizes the textual quality of penal mutilation, the way that it wrote the crime on the body; using Philippe de Rémi’s *La Manekine* as a case study, Hopkins reads the heroine’s self-inflicted loss of her hand and its eventual miraculous restoration as paradoxically liberating. Manekine’s negotiation of physical, legal, and identity problems reveals her to be a model for the disabled, capable of circumventing pity and embracing at least a sense of self-sufficiency.

Marian Lupo follows with a theologically informed discussion of Margery Kempe, whose Middle English autobiography has seemed to record a form of mental disability for many critics; Lupo argues that this ignores the contemporary understanding of the issues involved, and that Disability Theory can help us understand Margery even as Margery helps us understand disability and its social formation.

Donna Trembinski turns our attention to the Franciscan order, and the questions surrounding the illnesses which Francis suffered towards the end of his life. She delineates the way in which the fledgling Franciscan order had to decide what to do with a leader who was experiencing a variety of ailments, and also refusing to seek treatment. Traditionally, the disabled have been marginalized by their societies in various ways; this was very difficult to do with Francis.

The collection continues with Wendy J. Turner’s discussion of mental disability among the merchant class in the medieval English city, drawing on documentary evidence. Turner turns to the way in which English administrators wrestled with mental incapacitation in both criminal and inheritance cases, drawing on and modifying a well-developed Roman

terminology to create a sometimes very precise English set of terms. Turner traces changes to this terminology which testify to the careful and sophisticated approach taken by English law.

Finally, Cory James Rushton provides a look at Chaucer's Philomela, the victim of a bloody assault which leaves her unable to speak, making her a litmus test for the problem of legal accommodation for both women and the mute at precisely the historical moment when the oral oath and spoken proofs are giving way to written evidence. Rushton suggests that Chaucer testifies to a number of social and legal anxieties, even unconsciously. The conflict between pitying the disabled and the victimized, and actually being able to accommodate their differences, is still with us today.

Notes

¹ Matthew Paris, qtd. in F. M. Powicke, "The Murder of Henry Clement and the Pirates of Lundy Island," *History* 25 (1941): 285-310.

² Gerd Althoff, "Ira Regis: Prolegomena to a History of Royal Anger," in *Anger's Past: The social uses of an emotion in the Middle Ages*, edited by Barbara Rosenwein (Ithaca and London: Cornell University Press), 59-74.

³ Elaine Scarry, *The Body in Pain* (New York and Oxford: Oxford University Press, 1985), 27-59.

⁴ Michel Foucault, *The History of Sexuality: An Introduction*, trans. by Robert Hurley (New York: Vintage Books, 1990), 59.

⁵ Michel Foucault, *Discipline and Punish*, trans. Alan Sheridan (New York: Vintage, 1977).

⁶ Henri-Jacques Stiker, *A History of Disability*, trans. W. Sayers (Ann Arbor: University of Michigan, 1999), 66.

⁷ Michael Oliver, *The Politics of Disablement* (Basingstoke: Palgrave MacMillan, 1990), p. 27. See also Brendan Gleeson, *Geographies of Disability* (London: Routledge, 1999).

⁸ Margaret A. Winzer, "Disability and Society Before the Eighteenth Century," in Davis 1997, 76.

⁹ William Langland, *Piers Plowman: A New Annotated Edition of the C-Text*, ed. Derek Pearsall (Exeter: University of Exeter Press, 2008). In fact, the knight's intervention does not work, and Piers turns to Hunger itself, who literally beats the idlers. One could say law fails here, but in the process it also normalized: the law exists, perversely, to protect even the lazy from themselves.

¹⁰ This may sound perilously close to the argument made by Deborah A. Stone in her 1984 book *The Disabled State*: "In this she posits the historical existence of dual 'distributive systems' in societies: one involving the activities of those producing sufficient value to meet their own needs and more; and the other, what may be described as a 'social circuit of dependency' which includes those who

cannot maintain self-sufficiency. From this dualism a basic ‘redistributive dilemma’ is held to arise, presenting an enduring socio-political problem for states. The tension between the two systems based on work and need is the *fundamental distributive dilemma* (Stone, 1984:17) (emphasis added). For her, disability is explained as a juridical and administrative construct of state policy which is aimed at resolving this supposed redistributive predicament” (Gleeson, 64). Gleeson rightly notes that Stone’s model only obtains for a much more recent period in which individual achievement and individual reward are fully linked, but the *Piers Plowman* scene could be an interesting early version of this idea. Gleeson’s second objection to Stone is that her model “can only reveal the meaning of disability *to the state*; it cannot adequately claim to capture the concrete reality of impairment within social relations generally” (Gleeson, 65). For my purposes, this is precisely right: disability becomes disability when society, notably the law, begins to take account of and to define it.

¹¹ Simi Linton, “Reassigning Meaning,” in Davis 2006, 162.

¹² Metzler, p. 3. Her discussion is central, carefully negotiating the differences in modern terminology and the differences in medieval terminology.

¹³ Metzler, 20-21.

¹⁴ The classic discussion is in Oliver, 1990.

¹⁵ Metzler, 21.

¹⁶ Julie Singer, “Toward a transhuman model of medieval disability.” *postmedieval* (2010): 1-7.

¹⁷ Tobin Siebers, “Disability in Theory,” in Davis 2006, 178.

¹⁸ John of Salisbury, *Policraticus*, ed. and trans. by Cary J. Nederman. Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1990), 66.

¹⁹ John of Salisbury, 67.

²⁰ Cary J. Nederman, *Lineages of European Political Thought* (Washington, DC: Catholic University Press of America, 2009), 70.

²¹ Christine de Pizan, *The Book of the Body Politic*, ed. by Kate Langdon Forhan (Cambridge: Cambridge University Press, 1994), 90.

²² Particularly in *Of Giants* (Minneapolis: University of Minnesota Press, 1999) and *Monster Theory* (Minneapolis: University of Minnesota Press, 1997), an edited collection.

²³ David Williams, *Deformed Discourse* (Exeter: University of Exeter Press, 1996), 107.

²⁴ See Thomas W. Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Harvard University Press, 1990). The one-sex model is not universally considered the only gender model available to the Middle Ages: see also Joan Cadden, *The Meanings of Sex Difference in the Middle Ages: Medicine, Science, and Culture* (Cambridge: Cambridge University Press, 1995).

²⁵ Erving Goffman, *Stigma* (London: Penguin, 1968/1990), 14-15.

²⁶ *Silence*, ed. Sarah Roche-Mahdi, ll. 2601-2.

²⁷ *Silence*, ll. 2651-52.

²⁸ *Silence*, ll. 2921-75.

²⁹ Thomson qtd in Siebers, 23.

³⁰ Sharon L. Snyder and David T. Mitchell, *Cultural Locations of Disability* (Chicago, 2006), 23-4.

³¹ Cory James Rushton, "The King's Stupor: Dealing with Royal Paralysis in Late Medieval England," in Wendy J. Turner, *Madness in Medieval Law and Custom* (Leiden and Boston: Brill, 2010): 147-76.

³² Titchkosky, 6-7.

³³ Susan Sontag, *Illness as Metaphor and AIDS and Its Metaphors* (New York: Picador, 1988), 3, 55; Barbara Ehrenreich, *Bright-Sided: How Positive Thinking is Undermining America* (New York: Picador, 2010).

³⁴ Tory Vandeventer Pearman, *Women and Disability in Medieval Literature* (New York: Palgrave MacMillan, 2010).

³⁵ Seán Connolly, ed., *Bede: On Tobit and on the Canticle of Habakkuk*. (Dublin: Four Courts Press, 1997), 41-2.

³⁶ Metzler, 46.

³⁷ From *Civitate* 16.8, qtd. in Tim Stainton, "Reason, grace and charity: Augustine and the impact of church doctrine on the construction of intellectual disability," *Disability and Society* 23:5 (2008): 485-96.

³⁸ Stainton, p. 494.

³⁹ V. A. Kolve, *The Play Called Corpus Christi* (Stanford: Stanford University Press, 1966), 151-55.

⁴⁰ Jeremy J. Citrome, *The Surgeon in Medieval English Literature* (New York: Palgrave, 2006), 2.

⁴¹ Citrome, 5.

⁴² Citrome, 31.

⁴³ Sara M. Butler, "Medicine on Trial: Regulating the Health Professions in Later Medieval England," *Florilegium* 28 (2011), 73-4.

⁴⁴ J. Joyce Schuld, "Augustine, Foucault, and the Politics of Imperfection," *Journal of Religion* 80.1 (2000): 1-22, p. 11; see also R. A. Markus, "Two Conceptions of Political Authority: Augustine, *De Civitate Dei*, 19.14-15 and Some Thirteenth Century Interpretations," *Journal of Theological Studies*, n.s., 16 (1965): 68-100.

⁴⁵ William E. Mann, "Augustine on evil and original sin," in Eleonore Stump and Norman Kretzmann, *The Cambridge Companion to Augustine* (Cambridge, 2001): 40-48 (p. 43).

REFLECTIONS ON DISABILITY IN MEDIEVAL LEGAL TEXTS: EXCLUSION – PROTECTION – COMPENSATION

IRINA METZLER

Notions and perceptions of physically impaired people as presented in legal texts can tell us about the status, social position and rights (or restrictions) impaired people may have had. Similarly, the ‘evaluation’ of impairments in legal discourse can illuminate societal attitudes. What degree of legal differentiation was made? Were all impairments simply bundled together as so-called disabilities, or were physical impairments hierarchised (e.g. was sensory impairment regarded as worse than orthopedic impairment; was blindness regarded as worse than the loss of one hand)? Throughout I speak in terms of impairment when describing an anatomical, biological, material condition, rather than disability which as a term is reserved for the social and culturally-specific construct superimposed on impairment. In this distinction I am following the discipline of present-day disability studies.¹

I deliberately will disregard the issue of judicial maiming, i.e. the question of whether or not, and if so how frequently, people were physically impaired through punishments and judicial torture. Nevertheless there is some controversy as to the extent of these practices which cannot be answered in a short article such as this. However, two examples of mutilating punishments may serve as illustration of the problem. In the Laws of Cnut (compiled 1020-23) there seemed to be a reluctance to execute criminals outright, instead there was a sliding scale of judicial mutilation. This followed a principle similar to the modern notion of ‘three strikes and you’re out’. An accused man, who could be accused of any criminal act although the majority mainly related to theft, had three chances of conviction, with a harsher penalty in each instance: the first conviction could still be resolved by a compensation payment and through wergild, but the second and third instances required corporal punishments:

[30.4.] And on the second occasion there is to be no other compensation, if he is convicted, but that his hands, or feet, or both, in proportion to the deed, are to be cut off. [30.5] And if, however, he has committed still further crimes, his eyes are to be put out and his nose and ears and upper lip cut off, or his scalp removed, whichever of these is then decreed by those with whom the decision rests; thus one can punish and at the same time preserve the soul.²

Note that in terms of impairments, the second level of punishment caused the convicted criminal to have an orthopedic impairment, while the third level inflicted sensory impairments. Note also the clause denying legal responsibility, in that although it was likely that the third degree punishments would lead to the death of the convicted man, his death would not have been directly caused by capital punishment, which the laws of Cnut expressly tried to avoid for the sake of “preserv[ing] the soul”. Just over 200 years later, on the 30 August 1255, the council of Siena, the Consiglio della Campana, discussed the methods of punishment to be used against the occupants of the castle of Torriella in Val di Merse, who had rebelled against Siena. Some councillors wanted to blind the inhabitants, others to put out one eye of each, some to cut off their hands and feet, others to cut off just one hand and foot each, others still to hang them all.³ What this catalogue of potentially impairing mutilations demonstrates is, firstly, the readiness of contemporaries to apply penal mutilations, and secondly, the continuity with earlier judicial practices or traditions.

By the early Thirteenth Century the church was becoming more concerned about its clergy being involved in the shedding of blood (i.e. through warfare, practising surgery or by being present at judicial ordeals).

This insistence [at the council of 1215] that clerics should have no blood on their hands occurred at a time when secular justice was becoming increasingly bloody. As execution and mutilation grew in importance, edging out earlier systems based on compensation, the priest and the clerk found that the rules of their order and the practices of the secular courts were increasingly discordant.⁴

Whereas the older legal systems, both secular and clerical, had tried to avoid bloodshed and mutilation, by the thirteenth century secular legal proceedings began to deviate more strongly from such sentiments which canon law nevertheless still entailed. One important question for further research therefore might surround the apparent increase in judicial corporal punishments during the later middle ages.

However, in terms of sources for this present study, the focus is on secular texts from the period up to around 1300. This article will therefore not be covering canon law, or later medieval civil or secular law at any great length, but will focus mainly on the so-called *Leges Barbarorum* of the earlier medieval period, but also on some redactions of Roman law, which form the two key types of sources for the period 400-1200. Here the two main texts of Roman law were the Theodosian⁵ and Justinian Codes: the former compiled in 438, and confirmed to be the authoritative collection of Roman law in the western empire and subsequently under the barbarian rulers; in the eastern empire the Justinian code, completed in 534, became the main source. Western medieval Europe re-discovered the Justinian Code's *Digest* first in Italy from around 1050 onwards, spreading widely to the rest of western Europe during the twelfth century,⁶ which means that subsequent codifications of earlier, perhaps orally transmitted laws, became much more influenced by Roman law.

The Germanic tribes moving into the regions formerly ruled by Rome had also codified their laws, to some extent amalgamating Germanic and Roman customs.⁷ The laws of the Visigoths, especially the *Breviarium Alaricianum* compiled in the early sixth century, formed the foundation of many other collections, such as the laws of the Bavarians and of the Lombards; the text known as the Visigothic Code was itself compiled in the mid-seventh century; the laws of the Lombards were put together between 643 (the date associated with an important text known as Rothair's Edict) and 755; not forgetting the influential laws of the Salian and Ripuarian Franks.⁸ Furthermore, a multitude of Anglo-Saxon laws existed, for example the collection put together under the supervision of archbishop Wulfstan of York (died 1023) known as the laws of Ethelred, as well as laws of king Alfred, a translation into Latin and compendium or summary of the earlier Anglo-Saxon laws known as the *Quadripartitus* (1114), and finally the *Leges Henrici Primi* as a last collection that still shows the influence of the barbarian codes (made under Henry I some time between 1110 and 1120, with surviving manuscripts dating from c. 1201 and the early fourteenth century). To provide a southern European perspective, but also to highlight continuity with the earlier Visigothic code, some mention is made of the *Usatges* of Barcelona, issued in the mid-twelfth century within the court of count Ramon Berenguer IV of Barcelona (1131-62). Lastly, reference is also made to the *Sachsenspiegel* of the early thirteenth century, for reasons that this particular text still includes many of the kinds of attitudes encountered in the earlier barbarian codes, and can be located at the interstices of barbarian and later medieval legal codes.

The early legal texts are primarily concerned with three aspects of physical disability, which will therefore constitute the three focal points of this article:

1. The restriction, and thereby exclusion, of impaired persons to participate in public life, e.g. to inherit under certain conditions, to hold certain offices, to marry.
2. The protection of impaired persons in law, e.g. certain rights are accorded the physically disabled that the able-bodied do not have under similar circumstances.
3. Compensation law, with a multitude of examples (see table 1) to draw from during the earlier medieval period on monetary payments to injured parties in the event of loss of physical function of specific body parts.

Exclusion

Exclusion relates to the restriction imposed on impaired persons to participate fully in public life. Roman law in the case of the Justinian codes was particularly concerned about impaired people and their ability to make property transactions of various kinds (be it wills, stipulations, promises). Distinctions were made between congenital and acquired impairments, in that people who had been born with conditions such as deafness, blindness or muteness, were excluded from certain legal transactions or their transactions were regarded as not valid. For example, a blind man could not make a will (*Institutes* 2.12.4). The particular provisions made in the Justinian codes for persons with speech and/or hearing impairments will be considered below in a special section on the legal status of deaf and mute people. In general, sensorily impaired people could not be legal guardians of minors or of other legally incapable people, although the blind could appoint their own procurator. However, all groups of sensorily impaired – blind, deaf and mute – could inherit (*Institutes* 2.19.4).

Similar sentiments were carried forward into northern Europe. Infantilisation and abrogation of the legal rights normally accorded to non-impaired adults were the main restrictive aspects of Roman and some 'barbarian' laws. Nordic law codes, too, had sections excluding the physically impaired from certain legal rights or duties. In an Icelandic law code relating to jury service, those people who cannot walk fast enough are excluded from jury service.⁹ This begs the question why ability to walk fast mattered in relation to sitting on a jury. Was this a form of excluding

the elderly and senile as well as the young(er) physically impaired? This is found, too, in *Britton*, an Anglo-Norman law book of the late thirteenth century, where the following kinds of people are forbidden from making appearance by attorney: “no child under-age, no-one deaf, mute, nor natural fool, no purely demented man, nor anyone else without discretion [i.e. rational sense], nor anyone accused of a felony ... nor lepers ousted from the community of men”¹⁰ It is noteworthy that as recently as 1999 British law would not allow a deaf person to sit on a jury (since the deaf person would require an interpreter, which would mean *de facto* a thirteenth juror, according to the official reason given), whereas by that time in the US seven states had allowed deaf jurors to serve.¹¹

According to German legal texts from the second half of the thirteenth century, too, blind people could become neither judges nor members of the town council.¹² The well-known German *Sachsenspiegel*, compiled by Eike von Repgow around 1230, also has sections dealing with the legal exclusion of physically (and mentally) impaired persons. Most of these relate to the rights to inherit property or make property transactions, similar to the stipulations already found in Roman law. So, certain categories of impaired persons may not inherit:

Neither tenancy nor hereditary property can devolve upon the feeble-minded, dwarfs, or cripples. The actual heirs and their next of kin are, however, responsible for their care.

(Uf altvile unde uf getwerge erstirbit weder len noch erbe, noch uf kropels kint. Wer denne ir nehisten magen und erben sint, die enphan ir erbe und sollen si halden in ire phlage.)¹³

In a manuscript of the *Sachsenspiegel* at Oldenburg, made around 1336, an illustration accompanies this section of the text: figures of a leper, a blind man carrying a cane, and a cripple without arms and just one leg are shown in the margin of the page.¹⁴

Also similar to Roman law is the qualification the *Sachsenspiegel* placed on someone's ability to transact business with regard to their property, although again the qualification here is no longer to do with sensory impairments, but much more literally physical:

A man may transfer all movable property without consent of the heirs as long as he can climb on a horse by himself, with sword buckled on and shield in hand, using a wooden block or stone an ell high without help from anyone except the person who holds the horse and stirrup for him. But if he (fol. 22r) cannot execute this, he may not give away movable property nor transfer nor lend it in order to deprive the person who has claim to it upon his death.

(Alle varende habe gibit der man ane erben gelob in allen steten unde lezit unde liet gut de wile her sich vermag, daz her begort mit eime swerte unde mit eime schilde uf ein ros komen mag von eime steine adir stocke einir dummellen ho, sunder mannes hulfe, daz man im daz ros unde den stegereif halde. Wenne her des nicht geton mag, so en mag her geben noch lien noch lazen, daz herz ieneme mite entpherne, der ez wartende iz nach sime tode.)¹⁵

This precise description and requirement of physical skills could also exclude the elderly, and it is worth noting that occasionally in the *Sachsenspiegel* old men are described as feeble and decrepit. Interestingly, even the very local *Stadtrecht* (municipal law) of the city of Münster, which was transferred to the nearby town of Bielefeld between 1209 and 1214, expressed similar sentiments about the ability of a person to transmit property, stating: “8. While he is still capable of raising his hand, a sick burgess may bequeath his property if he wishes... (*Ein kranker Bürger darf, solange er noch die Hand erheben kann, seinen Besitz vermachen, wenn er will* ...).”¹⁶ Although primarily this regulation referred to persons on their death-bed, who needed to be just capable enough of raising their hand, by inference this could relate to the severely disabled, too.

The physically impaired could be quite excluded from legal rights given to able-bodied people. This becomes evident from the low position the impaired held in the ranking order of those people who are allowed to transact certain legal business. There is a section in the Theodosian code dealing with who can be appointed tutor for under-age children (Bk. III, title 17: *De tutoribus et curatoribus creandis*). In cases where the husband of the mother had died (section 4.3) the widowed mother was permitted to apply for guardianship of her under-age children herself (in contrast to other cases where a male tutor is appointed), but only in those circumstances where “a statutory tutor is lacking or when ... he is found to be incapable of managing even his own property because of mental or physical infirmity”.¹⁷ This complex legal stipulation means that ideally under-age children have a male and able-bodied tutor appointed for them, but if the only male tutor available happens to be mentally or physically impaired, then it is preferable, in the view of the law, to have the mother appointed tutor or guardian, whereas a woman would not normally have held such legal rights. Physical impairment in a male therefore becomes a disability in the modern sense, in that the male person is excluded from rights and activities otherwise associated with the masculine. For women, physical condition, whether impaired or able-bodied, is pretty much irrelevant in legal terms, since they were generally excluded from exercising legal rights anyway – that is why this section of the Theodosian