

Epilogue

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On Miller, Mini-Fujis, and the Meaning of Access

Mount Fuji is one of the most recognizable and iconic natural monuments in the world. Its magnificent stature and graceful, treacherous beauty has inspired poets and prophets alike.¹ During the Edo period (1615–1867), the Japanese built more than one hundred climbable replicas of Mount Fuji around Edo, or present-day Tokyo.² Climbing these “mini-Fujis” was a popular pastime throughout the late eighteenth century, particularly for the elderly (who could not manage the arduous trek up the real Fuji) and women and children (who were forbidden from the sacred, men-only summit).³

In *New Fuji, Meguro, No. 24*, Japanese woodblock artist Utagawa Hiroshige depicts both Mount Fuji and a mini-Fuji located outside of

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¹ See Melinda Takeuchi, *Making Mountains: Mini-Fujis, Edo Popular Religion and Hiroshige’s One Hundred Famous Views of Edo*, 24 *IMPRESSIONS* 27 (2002). Professor Takeuchi notes that “[i]n Fuji the rich lore of many traditions coalesces” and that “Shinto, Buddhist and a mishmash of popular faiths all claimed the mountain as their own.” *Id.* at 30.

² *Id.* at 25.

³ *Id.*

Edo.⁴ The real Fuji sits off to the right in the distance, enveloped in low gray clouds and separated from the rest of the scene by a wide, blank waterway. In the foreground, women, men, and children walk up a grassy foothill and relax at the top. Women in kimonos rest on pavilions at the foot of the hill or wander through the cherry blossoms alongside a clear blue stream. The sun is out, as can be seen by the shadows of the clouds and trees on the ground; the dappled spring arbor stands in stark contrast with Fuji's shining icy visage, still locked in winter.



⁴ Utagawa Hiroshige (Ando), *New Fuji, Meguro, No. 24*, in ONE HUNDRED FAMOUS VIEWS OF EDO (1858). This image is made available by the Brooklyn Museum for reproduction under a Creative Commons Attribution-NonCommercial 3.0 license.

What does all this have to do with Arthur Miller, this Symposium, or modern-day access to justice? To be sure, Professor Miller is a well-known collector of Japanese woodblock prints.⁵ In 2011, Queen Elizabeth II named Professor Miller a Commander of the Order of the British Empire in recognition of his gift to the British Museum of nearly two thousand prints by Utagawa Kuniyoshi.⁶ Like Hiroshige, Kuniyoshi was one of the most popular woodblock artists of the nineteenth century.⁷ His fantastic scenes of warriors and demons, of geisha and kabuki actors, of serpents and grotesques, are “[a]s elegantly sumptuous as they are imaginatively extravagant,” according to a reviewer of a traveling exhibit of the Miller Collection.⁸ Professor Miller recalls being immediately drawn to the “dramatic, powerful, heroic”⁹ battle imagery in Kuniyoshi’s work, admitting a possible affinity between those images and his own “gladiatorial personality.”¹⁰ Certainly a Symposium that commemorates and explores Professor Miller’s diverse contributions—as teacher, lawyer, policymaker, and media personality—would not be complete without also acknowledging his passion for this artistic tradition.

Even beyond that connection, however, the mini-Fuji serves as an opportunity to reflect upon some of the issues revolving around access today and discussed by the distinguished contributors to this Symposium. Consider first the mini-Fuji. The mini-Fuji is a product of human invention, inspired by the real thing but scaled down, reproduced in multiple places, and designed to be attainable, inclusive, public, and accessible. The disenfranchised and the weak can walk the facsimile’s paths, and although a mini-Fuji may not offer the full spiritual payoff of the summit hike of the real Fuji, it certainly creates an impression of the real experience for those who would

⁵ See *Graphic Heroes, Magic Monsters: Japanese Prints by Utagawa Kuniyoshi from the Arthur R. Miller Collection*, JAPAN SOC’Y, http://www.japansociety.org/graphic_heroes_magic_monsters_gallery (last visited Mar. 5, 2012). Three prints from Hiroshige’s *One Hundred Famous Views of Edo* hang on the wall of Professor Miller’s office at Milberg LLP in New York.

⁶ See *Arthur Miller Named a Commander of the Order of the British Empire*, NYU LAW, http://www.law.nyu.edu/news/MILLER_CBE (last visited Mar. 5, 2012).

⁷ *Kuniyoshi*, ROYAL ACADEMY OF ARTS, <http://www.royalacademy.org.uk/exhibitions/kuniyoshi> (last visited Mar. 5, 2012).

⁸ Ken Johnson, Art Review, *Epics and Erotica from a Grandfather of Anime*, N.Y. TIMES, Apr. 16, 2010, at C28.

⁹ Arthur R. Miller, *Foreword*, in TIMOTHY CLARK, KUNIYOSHI: FROM THE ARTHUR R. MILLER COLLECTION 14 (2009).

¹⁰ *Id.* (citing Sir Harold Evans).

otherwise have no such impression at all. Further, the existence of multiple mini-Fujis offers related yet differentiated experiences with respect to architecture and amenities. The *New Fuji, Meguro*, for example, features smooth switchbacks up a grassy slope; Hiroshige's *Original Fuji in Meguro*, by contrast, depicts travelers following a path marked at regular intervals by scrubby pines.¹¹ In both of these scenes, and by all accounts of the mini-Fujis generally, the public congregated at mini-Fuji sites for various reasons beyond devotional practice, including leisure, public recreation, entertainment, and companionship.¹² The mini-Fujis were not, therefore, simply dumbed-down imitations of the original but instead themselves became rich, variegated sites of cultural praxis.

Now consider the civil justice system. Like the mini-Fuji, the civil system approximates the contours of what we imagine justice to be, reconfigured as a bureaucratic institution that takes in cases and churns out results. Like the mini-Fuji, the system is constructed—it is not inevitable or natural—with political priorities and choices shaping the entry points and corridors and possible outcomes that disputants encounter when they seek redress from civil justice. As many Symposium contributors have pointed out, liberal access rules mean, at the most basic level, that more people can come into the system with less, which reflects a particular attitude toward the role of civil litigation in managing human and business relationships.¹³ Accordingly, the take-all-comers, easy-to-use mini-Fuji is a simple metaphor for the choices we make regarding the extent to which the civil justice system and related alternative processes (both court-annexed and otherwise) permit access to public power by diverse constituencies dealing with a variety of disputes. Like the mini-Fuji, there are a multitude of forums available to seek civil justice, from court-annexed mediation to mandatory arbitration to full-blown litigation. And like the mini-Fuji, the civil justice system has its own cultural significance beyond the business of dispute resolution, as a site of entertainment (Judge Judy), of ideological wrangling (the

¹¹ See Utagawa Hiroshige (Ando), *The Original Fuji at Meguro (4/1857)*, in MIKHAIL USPENSKY, *HIROSHIGE: ONE HUNDRED VIEWS OF EDO* 67 (2005). The Original Fuji was seventeen years older and one mile north of the New Fuji. *Id.* at 66.

¹² See *id.*; see also Takeuchi, *supra* note 1, at 25 (“Hiroshige’s climbers appear . . . to have come more for an outing under the beautiful spring cherry trees than for the religious experience of ascending the proxy of a sacred mountain.”).

¹³ Brooke D. Coleman, *What If?: A Study of Seminal Cases as if Decided Under a Twombly/Iqbal Regime*, 90 OR. L. REV. 1147 (2012); Edward H. Cooper, *King Arthur Confronts TwIqy Pleading*, 90 OR. L. REV. 955 (2012).

Supreme Court), of personal identity (the Tea Party, Occupy Wall Street), and of political/national norms (the notorious litigiousness of Americans, say).

Comparing mini-Fujis and the civil justice system resonates with some of the difficult questions posed by access to justice today.¹⁴ Who can use the civil system, and for what? What gatekeeping mechanisms should be in place, and how stringent should they be? How much variety in dispute processing should we encourage, considering the sometimes-incompatible aspirations of individual disputants and broader society? What is the relationship between real justice and what our legal institutions actually deliver, and are these two things similar enough to warrant continued faith in the system? How does the availability of legal process and remedies shape the norms and expectations of private citizens? As the answers to these questions develop and change, we change the system: through statutes, common law, rules, policies, and innovations—all ideally in an effort to match more perfectly the operation of our man-made civil system to the demands of justice itself.

Additionally, the comparison brings us to one of the most difficult problems in human-created systems: the nature and quality of the relationship between the copy and the original. At first blush, copies seem inherently less valuable than originals, at least to Westerners with strong normative beliefs around ownership, authorship, discovery, and individuality. Indeed, as Professor Takeuchi observes, Western philosophy “associat[es] the simulacrum with cheap sentimentality, nostalgia and reductionism indicat[ing] a prominent strand of distrust of the replica.”¹⁵ So whether climbing a mountain or filing a lawsuit, some people—wealthy corporations in the civil justice system perhaps, or adult male pilgrims in eighteenth-century Japan—are having more “original” and more authentic and therefore better experiences than others. On this view, it would be easy to conclude our study of mini-Fujis and access with the pessimistic

¹⁴ See Jay Tidmarsh, *Access to Courts and the Democratic Order*, JOTWELL, <http://courtslaw.jotwell.com/access-to-courts-and-the-democratic-order> (Jan. 30, 2012) (reviewing Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011)) (“The access-to-courts question . . . should be the central civil-justice issue of our day.”).

¹⁵ Takeuchi, *supra* note 1, at 26. Exploring the relationship between the copy and the original is a bulwark of postmodern analysis. See, e.g., Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 224 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955) (noting the lack of “authentic[ity]” in reproducible art, such as photographs).

observation that society builds false mountains to occupy the masses while an elite few breathe the rarefied air of political and legal privilege.¹⁶

Yet Professor Takeuchi goes on to point out that in East Asian traditions, “symbolic substitution/replication” often “evoke[s] and explicate[s] the transcendent”¹⁷ to practitioners, a process that is not the same as supplying supplicants with low-quality copies.¹⁸ In fact, it is the “transmutability of physical stuff” into hand-held or other scaled-down relics that often shape the rich practice and philosophy of many of these cultures. Not only does reduction and replication provide access to populations who would otherwise have no access at all (such as women and children practicing a Fuji-based religion), but also the “process of miniaturization” pulls out the socially relevant components of the natural phenomenon and thereby “opens up new areas of discursive meaning.”¹⁹ In other words, redefining something incomprehensively vast and idealized into something more tangible and manageable is a creative process, and the result—though modeled on the original—is something new. Furthermore, unlike the original, the derived miniature can be reimagined and reconstructed, over and over again.²⁰

This frame on the matter fits the Miller Symposium within the larger metaphor of mini-Fujis and access to justice. No doubt there is a gap between “real” justice and the system that we have, and the copy only ever approximates the original. But as Professor Miller’s own distinguished career demonstrates, the work of civil justice is

¹⁶ Examples of such “false mountains” might include diversions from traditional litigation, such as mandatory or privately initiated alternative processes for dispute resolution. See, e.g., CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* (1996) (describing “dispute systems design,” an organizational conflict management tool meant in part to head off litigation in the early stages). Other examples of “false mountains” are barriers to litigation such as the newly coined “plausibility” standard in Federal Rule 8, which arguably makes access to “real” justice more difficult. See, e.g., Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *DUKE L.J.* 1, 2 (2010) (arguing that recent jurisprudence has created “expensive and time-consuming procedural stop signs that produce earlier and earlier termination of cases, thereby increasingly preventing claimants from reaching trial”).

¹⁷ Takeuchi, *supra* note 1, at 26.

¹⁸ See *id.* at 27.

¹⁹ *Id.* at 43.

²⁰ Scholars have examined and theorized this disconnect between law and its human expressions before, of course. See, e.g., Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority,”* in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3 (Drucilla Cornell et al. eds., 1992).

within the relentless, creative struggle to bridge that gap, using the many permutations and possibilities of the law. The fact that ideals and realities do not match is not a reason for despair; rather, it is a reminder that human-made systems are just that—human-made—and are therefore within our power to define and redefine. This Symposium is an opportunity to acknowledge and appreciate that ongoing quest; and in honoring Professor Arthur Miller, we remind ourselves of the great and sublime responsibility we too undertake in endeavoring to make the civil system a more perfect expression of justice itself.

