Diplomas, Degrees, and Discrimination

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DIPLOMAS, DEGREES, AND DISCRIMINATION

Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.¹

One of the most observable traits in the current labor market is the increasing reliance of employers on educational credentials as employment criteria.² Education, long esteemed for values other than its marketability,³ has in large part been transformed into an employment preparation process. The O'Toole Commission, which investigated aspects of American employment, found that, “although the value of a college education is not solely measurable in terms of its usefulness in the marketplace, the dominant interest, constantly reinforced in America, is in its marketability.”⁴

The practice of imposing educational requirements as employment criteria, referred to as “credentialism” by economists and educators,⁵ affects different groups in the society in different ways. As observed by one commentator:

"Given the way our educational system functions, the widespread practice of requiring a credential as a necessary condition for job consideration is one that is bound to have an adverse impact on employment for members of [the] group of last entry. In the United States in 1970, 82 percent of the relevant age group was completing twelfth grade. The remaining 18 percent included a disproportionate number of Blacks, Indians, and Spanish-surnamed Americans, who likewise are represented in the lower socioeconomic class in disproportionate numbers."⁶

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2. U.S. Office of Education, Report on Higher Education 39 (1971): “From the studies we have seen and the interviews we have had with employers, we believe that educational credentials are not only increasingly required for jobs, but that the requirements themselves are rising.”
Although widespread education has been a persistent and cherished goal of American society, the foregoing observations suggest that the emphasis placed on educational attainment vis-à-vis employment has caused, and may continue to cause, harmful social consequences. Many groups which have, for a variety of reasons, historically been disadvantaged in American society have also, for substantially the same reasons, failed to achieve educational parity with the white majority. In an era in which continuing efforts are being made to remove irrational obstacles to the social and economic advancement of minority groups, unfettered utilization of educational credentials as a job criterion continues to impede such progress. The impediment, however, is neither necessary nor inevitable, for legal remedies are available to remove it.

This note will examine credentialism in the American labor market and discuss the mechanisms available to curtail its prevalence as an employment practice. The first portion of the article will discuss the adverse effects of credentialism on potential employees, the labor market, and the educational process itself. The second portion will analyze one of the major available remedial tools: Title VII of the Civil Rights Act of 1964.7

The Adverse Effects of Credentialism

Discrimination Against Minorities

The most critical aspect of credentialism is its discriminatory impact on minorities.8 The statistics reflecting unequal educational attainment of minorities and nonminorities are familiar to those involved in education.9 Although the figures indicate that minorities have in-

8. Although the focus of this article is race discrimination, much of the discriminatory impact of credentials falls upon women and senior workers. For women, this is especially true for occupations requiring specialized degrees in engineering or business. ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 101 (1973). Likewise, since previous generations typically placed much less importance on education credentials than contemporary employers, credential requirements effectively discriminate against the older worker. C. JENCKS, M. SMITH, H. ACKLAND, M. BANE, D. COHEN, H. GINTIS, B. HEYNS, S. MICHELSON, INEQUALITY 63 (1972) [hereinafter cited as JENCKS].
9. The percentages of workers in March 1973 by race, age, and education were as follows:

<table>
<thead>
<tr>
<th>Year of Education</th>
<th>White</th>
<th>Black and Other Races</th>
</tr>
</thead>
<tbody>
<tr>
<td>High School</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 years or more</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 to 24 years old</td>
<td>81.5</td>
<td>60.8</td>
</tr>
<tr>
<td>25 years old and over</td>
<td>70.0</td>
<td>50.6</td>
</tr>
<tr>
<td>College</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1 year or more</td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 to 24 years old</td>
<td>32.8</td>
<td>23.3</td>
</tr>
<tr>
<td>25 years old and over</td>
<td>30.1</td>
<td>18.9</td>
</tr>
</tbody>
</table>

creased their absolute educational achievement over time, the disparity relative to whites has nonetheless made marginal increases. 10 Absolute educational advances are not helpful to minorities if their relative disadvantage remains unchanged. In a society continually raising its educational demands commensurately with increases in average educational levels, those at the front of the educational completion ranks are those first hired by employers seeking credentialed individuals. 11

In addition to thus effectively discriminating against many minority groups, an educational requirement for employment also fails effectively to distinguish among differing levels of individual ability. 12 Employers fail to recognize diversity in educational achievement as long as the "paper proof" of the experience is the same. It is clear that some children who finish high school, but do not enter college, would continue their education but for their parents' inability to finance further schooling. 13 Other high school graduates can barely read but are passed through a school system which, aware of its own failings, awards degrees almost without regard to individual capabilities. 14 Thus the highly capable and the marginally capable individual may compete equally for jobs which require a high school diploma, while neither can apply for jobs which require a college degree. Such indiscriminate leveling of individuals is not only personally debilitating, but also socially inefficient.

Distortion of the Educational Process

The emphasis on employment as the ticket to a job also contributes to a distorted view of the value of education and the role of educational institutions in our society. Many students feel compelled to stay in school merely because the diploma or degree awarded for satisfac-

10. S. Miller, & P. Roby, The Future of Inequality 126 (1970). As demonstrated by these authors, minorities increase their educational attainment to the high school level while whites continue to forge ahead at the college level.
12. "Credentialism obscures the immense variation in the learning that is represented by diplomas. The superior student and the borderline student, and the graduates of superior institutions and of mediocre institutions, are all lumped together as 'educated,' whereas dropouts or pushouts who may possess comparable knowledge and skills are seriously discriminated against." Marien, Beyond Credentialism: The Future of Social Selection, 2 Social Policy 15 (Sept.-Oct. 1971).
13. This phenomenon is clearly reflected in studies indicating that education is highly correlated with parental income. See Michelson, The Further Responsibility of Intellectuals, 43 Harv. Ed. Rev. 92 (1973); Jencks, supra note 8, at 21-22, 141.
14. This problem has become so acute that the University of California faculty has recommended reading exams be given to entering undergraduates. Resolutions of the 1975 Faculty Conference: Entering Undergraduates, Report to President Hitch, University of California.
tory attendance is so valuable in the labor market.\textsuperscript{15} The unique value of educational credentials to virtually every attractive career means that both those who will and those who will not eventually fill those scarce employment positions must complete the formal schooling to stay in the running.\textsuperscript{16} With so many young people pursuing so few "high status" jobs, failure is inevitable for a vast number. The declining rate of return on education, concludes the Coleman Report, "will lead to a new problem, a problem with which the United States has had little experience, the existence of a relatively large group of highly educated but underemployed and disappointed young people."\textsuperscript{17}

Similarly, as educational institutions distribute credentials which they realize are highly prized by students and employers in job allocation, the process of awarding those degrees necessarily affects the educational system.\textsuperscript{18} The extent of the impact is not yet clear, but writers familiar with the problem have described its contours.

Existing labor market pressures and projections (particularly as they relate to occupational needs and skill requirements) operate on those who "run" the university—the faculty and administration. These pressures affect course and curricular requirements and the allocation of resources to competing programs.\textsuperscript{19}

Other commentators claim that the effect on education is even more pervasive: "the market value of education has driven out its other values."\textsuperscript{20}

Credentialism has created other problems for education, as well. Since many students know they must complete schooling to compete suc-


\textsuperscript{17} President's Science Advisory Comm., Youth: Transition to Adulthood 75 (1973).

\textsuperscript{18} "Even now there is some concern about overemphasis on academic certification and prolonged periods of study in higher education. If these fears are justified, then it must be true that employers, by using degrees as proxies for other desirable traits in prospective employees, have to some extent changed the emphasis in colleges and universities from learning to degree granting. Such an impact can occur without the active cooperation of the institutions themselves. The enrollment of large numbers of students who primarily seek a degree so that they can enhance their job prospects is sufficient to place great strain on traditional education programs, especially those that are not geared to prepare students for short-run professional goals." Fogel & Mitchell, Higher Education Decision Making and the Labor Market, in Higher Education and the Labor Market 498 (M. Gordon ed. 1974).


\textsuperscript{20} Work in America, supra note 4, at 108.
cessfully in the employment market, they take courses required by the college or high school for the credential but not relevant to their eventual career choices. In order to attain the desired academic degree, these students must enroll in certain courses solely to fulfill the credential requirements. The resulting attitudes produce little advantage for either the student, the class, or the school. Addressing this problem, Shiela Huff has predicted that a narrowing of the job orientation currently associated with education would result in positive benefits: "The educational system might continue to grow, not because of increasing degree requirements for jobs, but because people were interested in the courses offered."21

The deleterious impact of credentialism on individuals and educational systems is hardly counterbalanced by the dubious benefits to the labor market. Although employers currently rely heavily on credentials in hiring and promotion decisions, few have a clear rationale for so operating.22 A recently developed and growing body of literature suggests that few positive economic returns accrue from the practice of hiring workers with more education; in fact, credentialism may actually impede rather than promote an efficient labor market.23 Since a given level of education does not necessarily represent similar educational achievements, and since individuals intellectually capable of further education do not have similar economic resources, hiring decisions made on the basis of credentials are incapable of distinguishing the intelligent from the persistent, or the wealth-advantaged from the mentally gifted.

Alienation of Employees

Once hired, workers often display various forms of alienation, at least some of which are associated with the credentialing process responsible for their having been chosen for the job.24 The failure to garner a desired position after several years of study may result in in-
efficient on-the-job behavior, chronic absenteeism, and numerous job changes in search of a lost dream.\textsuperscript{25} For workers who feel their employment situation is beneath their educational achievements, the work place may be a focus of frustrated expectations.

The overall impact of these effects taken together presents even more troubling social implications. If, as the evidence strongly indicates, educational attainment confers occupational status and personal income,\textsuperscript{26} which in turn confers educational benefits upon offspring,\textsuperscript{27} the cycle of poverty and privilege is legitimized and reinforced by credentialism. The consequent social stratification dims the chances for mobility that is the essence of modern America. Thus, an essentially artificial process dooms the children of the havenots to have little more.

\textbf{A Legal Approach to Credentialism}

One method of mitigating the adverse effects of equating educational achievement with work performance capability is to curtail or prohibit the use of educational credentials as employment criteria. Legislation dealing specifically with the often counterproductive relationship between education and labor by compelling employers to rationalize completely their hiring procedures does not yet exist. Nevertheless, the Civil Rights Acts of 1866 and 1871,\textsuperscript{28} recently exhumed,\textsuperscript{29} and Title VII of the Civil Rights Act of 1964, with important amendments broadening its coverage added in 1972,\textsuperscript{30} could bring considerable pressure to bear on employers whose credential criteria have a discriminatory impact and are not valid predictors of job performance. The substantial body of law that has developed under the analogous

\textsuperscript{25} BERG, supra note 22, at 66; WORK IN AMERICA, supra note 4, at 138; OCCUPATIONAL OUTLOOK, supra note 16, at 20.

\textsuperscript{26} OCCUPATIONAL OUTLOOK, supra note 16, chart 11, at 22.

\textsuperscript{27} "In 1968, it was twice as likely that a young person would attend college if his family's annual income exceeded $15,000 than if the income were between $5,000 and $7,500." S. LEVITAN, G. MAGNUM & R. MARSHALL, HUMAN RESOURCES AND LABOR MARKETS 17 (1972); see JENCKS, supra note 8, at 19-20, 138; Michaelson, The Further Responsibility of Intellectuals, 43 HARV. ED. REV. 64 (1973).


\textsuperscript{29} Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Jones was the first unequivocal Supreme Court decision holding that there is a private right of action under 42 U.S.C. § 1982. The decision has also been uniformly interpreted to revive the right of private action under sections 1981 and 1983 as well. See, e.g., Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Waters v. Wisconsin Steel Works of Internatl Harvester Co., 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911 (1970). See cases cited note 32 infra.

provisions of Title VII\textsuperscript{31} and sections 1981 and 1983\textsuperscript{32} of the earlier Civil Rights Acts indicates the illegality of credentialism. Yet the relative novelty of the legal principles involved in employment discrimination litigation has left many issues unresolved and others in a state of confusion. The remainder of this article will delineate a legal approach to the credentialism problem through consideration of the applicable burdens of proof, the available defenses, and the appropriate remedies.

The Prima Facie Case

Although private individuals are not always required to practice nondiscrimination, discriminatory practices affecting interstate commerce are appropriate subjects for federal legislative action.\textsuperscript{33} Title VII, as interpreted by the Supreme Court, is such an enactment, limiting judicial intrusion into private hiring decisions to those practices which have a discriminatory impact.\textsuperscript{34} The first step in Title VII litiga-


\textsuperscript{33} Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

\textsuperscript{34} "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1970), \textit{as amended} (Supp. III, 1973). "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
tion is thus the establishment of a prima facie case of discrimination by demonstrating that use of a particular hiring criterion has a discriminatory impact. When the alleged discriminatory impact results from use of an educational credential as an employment prerequisite, establishment of a prima facie case under Title VII is an unusually simple task.

The elements necessary for a prima facie case under Title VII were enumerated in the landmark Supreme Court case of *Griggs v. Duke Power Co.* The Duke Power Company had required a high school diploma for hiring in any of its departments, except the labor department, and for transfer from its coal handling department to any inside division (operations, maintenance, or laboratory). Until 1965, blacks were prohibited from employment in any except the labor department. In 1966, the year in which Title VII became effective, the company added a further requirement for new employees: in addition to possessing a high school degree, an applicant for any position other than one in the labor department was required to score satisfactorily on two aptitude tests.

The Fourth Circuit reasoned in part that because “the Company initiated the policy with no intent to discriminate . . .” there was no violation of the act. In an opinion by Chief Justice Burger, a unanimous Supreme Court reversed, holding that proof of a discriminatory purpose was not a necessary element in establishing a prima facie case:

**We do not suggest that either the District Court or the Court of Appeals erred in examining the employer's intent; but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as “built-in head-winds” for minority groups and are unrelated to measuring job capability.**

In focusing on the effect rather than the purpose of the particular practice, the Court emphasized that “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Thus, after *Griggs*, the plaintiff's burden is only to show that “'X' intended to engage in the practice that has a discriminatory impact, not that 'X' intended to discriminate.”

36. 420 F.2d 1225, 1232 (4th Cir. 1970).
38. *Id.* at 432.
39. *Id.*
Establishing the Discriminatory Impact

The next question, of course, is how the discriminatory impact is to be established. Courts generally, including the Supreme Court in *Griggs*, have tended to rely on census statistics which demonstrate that minorities have a lower propensity than nonminorities for attaining specific educational levels. Griggs itself struck down educational requirements on the basis of 1960 census data which indicated that 34 percent of white males graduated from high school in North Carolina, compared to only 12 percent of black males.

The use of census data in conjunction with the "head-winds" concept is extremely significant for two reasons. First, a plaintiff need not demonstrate that the requirement of an educational credential will exclude all minorities, or that all nonminorities will be favored. The screening effect of the educational requirement in the *Griggs* decision eliminated 66 percent of the white males and 88 percent of the black males. Although both races were thus affected by use of the criterion, the essence of the proof offered in the form of census data was that the impact on blacks was at a rate 22 percent greater than on whites.

Second, the *Griggs* holding established that the measurement of discriminatory impact is to be taken outside the context of the plant where the discrimination allegedly occurs. When impact is measured outside the plant, the plaintiff is relieved of the burden of demonstrating that the racial composition of the plant itself is not commensurate with the racial composition of the community, and the defendant cannot invoke the defense of approximate racial parity.

In a Title VII case asserting that a greater percentage of minorities than nonminorities has been excluded by the employer's criteria, the comparison of racial composition of the plant to racial composition of the surrounding community is not required.

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41. See, e.g., cases cited notes 31-32 supra.
42. 401 U.S. at 430 n.6.
43. There are two statistical methods available to the plaintiff's lawyer to demonstrate a discriminatory impact: (1) a disparity in the percentage of minorities within the employers plant, compared to the minority representation in the community from which the employer draws his personnel, and (2) a disparate percentage of minorities excluded due to the employer's employment criteria. For an excellent analysis, see Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 92 (1972).
44. See Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); cf. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971). If a plaintiff is able to demonstrate that a greater percentage of minorities are excluded by the employer's employment criteria than nonminorities, the employer could only achieve approximate racial parity with the community by increasing the number of minority applicants, and thereby increasing the number rejected. This obviously does nothing to remedy a discrimination defined as a situation whereby a greater percentage of minority as compared to nonminority applicants are excluded by the employer's criteria.
community is simply irrelevant. Thus, the Fifth Circuit, clearly the most prolific and experienced court in Title VII litigation, disallowed a defense in Johnson v. Goodyear Tire & Rubber Co. that attempted to demonstrate racial parity in the plant, stating,

Goodyear directs our attention to many statistics which it asserts establish that it has transferred black employees from the labor department and hired blacks from the Houston area in a ratio equivalent to the total black population in the area. However, reliance on such data misinterprets the significance of Johnson's proof ... Such evidence does not disprove the essential finding that the tests have a detrimental impact on black applicants. It merely discloses that Goodyear has attempted by other practices to remove the taint of the tests' consequences. The fact still remains that for those potential black hires and black labor department transferors, these unvalidated testing devices have a substantial invidious effect.

The reasoning of the Fifth Circuit is not dissimilar from that of the Supreme Court in Phillips v. Martin Marietta Corp. In that case, despite the fact that the employer hired women for 75 to 80 percent of the positions available, the court concluded that a hiring requirement that women have no preschool age children, a criterion not applied to men, was discriminatory on the basis of sex. When the criterion is discriminatory, the number of minorities hired despite the criterion is unimportant. Were an employer able to avoid liability by demonstrating that notwithstanding the discriminatory credential requirement he hired minorities in a ratio commensurate with the minority ratio in the community, the discriminatory impact would merely have been shifted further down the line. At some point the use of the requirement

45. See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Duhon v. Goodyear Tire & Rubber Co., 494 F.2d 817 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974). As observed by one court, "While discrimination exists and has existed nationwide, because discrimination has been more overt in the states of the Fifth Circuit that court has become very experienced in and sensitive to the subtle problems of racial discrimination." Mack v. General Elec. Co., 329 F. Supp. 72, 75 (E.D. Pa. 1971).

46. 491 F.2d 1364, 1372-73 (5th Cir. 1974).

47. 400 U.S. 542 (1971).

48. Id. at 543-44.

49. This concept can be understood by envisioning an area containing 2,000 workers, composed of equal numbers of minorities and whites, with the high school credential attainment equal to that of the national average (approximately 60% and 80% respectively). If eight plants exist in the area, each requiring a high school diploma for employment, and each hiring 200 persons, six of the plants can establish a minority population in parity with the population of the area. Plants seven and eight however, in order to use the credential requirement, must hire greater numbers of whites than minorities. The discriminatory impact of the degree requirement has been passed down the line to plants seven and eight. It would be anomalous to hold only plants seven and eight liable for discriminating, since it is the credentialism process that has created
will eliminate a disparate percentage of minorities from employment, and the policy behind Title VII dictates that no company should be able to contribute to that ultimate effect by the maintenance of the discriminatory educational criterion.

The employer in Johnson v. Goodyear Tire & Rubber Co. attempted two other novel, but unsuccessful, defenses. First, Goodyear attempted to limit the relevant age group for statistical purposes to sixteen to twenty-four year olds, presumably because the disparity in that age group is less than in the overall population. The circuit court, rejecting this approach, pointed out that "[a] 'young' black individual, whether age 25 or 45, is a potential employee in the Goodyear plant." Second, Goodyear proposed the immediate Houston area as the geographic region in which the comparison of relative educational attainment was to be measured. The court chidingly responded,

Goodyear's geographic . . . limitations conveniently ignore the recognized mobility of today's black labor force . . . . [A] black individual of rural Texas today, may be an active participant in the Houston labor pool tomorrow.

The court concluded by rejecting an approach of "selective interpretation" of statistics:

Goodyear's limited and selective interpretation of the 'relevant' statistics overlooks previous judicial precedent. In Griggs v. Duke Power Company, the Supreme Court relied on statistics for the entire state of North Carolina. Even more compelling, in United States v. Georgia Power Company, our court considered statistics for the South as a whole and the immediate Atlanta area. The utilization of these statistics implicitly recognizes the mobility of today's labor force . . . .

Courts are thus clearly cognizant of the potential manipulative abuse of statistics. The utilization of a credential requirement, whenever it can be shown that minorities have not achieved the requisite educational status in equal proportion to whites, will constitute a prima facie case of discrimination under Title VII.

The Business Necessity Justification

Having demonstrated a discriminatory impact and thereby established a prima facie case, the plaintiff has satisfied his burden of proof. Nevertheless, a hiring criterion with a discriminatory impact is not illegal per se; the employer is entitled to attempt to show that the result.


50. 491 F.2d 1364 (5th Cir. 1974).
51. Id. at 1371.
52. Id.
53. Id.
requirement is justified. The justifications available to the defendant for the use of discriminatory criteria and their possible application in the credentialism context are therefore the next area of concern in Title VII litigation.

The Supreme Court decision in *Griggs* again supplies the relevant legal principles. Three important points relevant to the defense of justification emerge from that decision. First, the burden of providing the rationale rests with the defendant: "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." Second, as is implicit in the passage just quoted, the screening requirement in question must be related to the particular job for which it is used. As the Supreme Court emphasized, "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." Third, a mere hypothetical relationship to the job is not sufficient to justify a discriminatory employment practice. The Court discussed and approved as the legal requisite the EEOC Guidelines establishing standardized procedures for justifying discriminatory criteria:

The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.

The Need for Statistical Validation

The EEOC Guidelines clearly include educational criteria within the definition of "tests." In establishing validation procedures for "tests," the Guidelines provide that

"[e]vidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are

55. 401 U.S. at 432.
56. Id. at 431.
57. Id. at 432 (citations omitted). Appellate court decisions following the *Griggs* holding have relied on the EEOC Guidelines. E.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 221 (1974) (citations omitted): "[W]e note that the company has at no time attempted to validate its tests under the EEOC Guidelines, which we found mandatory in Georgia Power."
relevant to the job or jobs for which candidates are being evaluated.\textsuperscript{59}

The available evidence, although admittedly not extensive, indicates that statistical validation of an educational credential according to the EEOC Guidelines is highly unlikely. Professor Ivar Berg, in studies of both blue collar and white collar occupations and the relationship of job performance to educational credentials, discovered that credentials were seldom positively correlated to performance and were sometimes even \textit{inversely} related.\textsuperscript{60}

\textbf{Existence of Alternative Hiring Procedures}

Even if a defendant could produce satisfactory statistical validation, however, he would have only met one-half of his burden. The Guidelines provide that in addition to showing a statistical relationship, the employer must "demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."\textsuperscript{61} Shortly after the \textit{Griggs} decision approved the EEOC Guidelines as legal standards, the Fourth Circuit in \textit{Robinson v. Lorillard Corporation} set forth the principles applicable to the defense of justification:

\begin{quote}
The challenged practice must effectively carry out the business purpose it is alleged to serve; \textit{and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.}\textsuperscript{62}
\end{quote}

The court emphasized that "a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory."\textsuperscript{63}

\textsuperscript{59} \textit{Id.} \S 1607.4(c).

\textsuperscript{60} "In the first of the field investigations, data were collected in 1967 on the productivity, turnover, and absenteeism of 585 former and present female workers in a multi-plant Mississippi textile manufacturing company. We found that educational achievement was \textit{inversely} related to performance thus conceived." \textit{Berg, supra} note 22, at 87.

In a study of 4,000 "debit agents" employed by Prudential Insurance Company, Professor Berg found that "[t]he records of high school graduates rarely differed by more than a few percentage points from those of comparably numerous college graduates of similar age operating in similar markets: sometimes the less educated men did better, although a few did not do so well as their better-educated contemporaries." \textit{Id.} at 93.

In another white collar study, Professor Berg found the results to be in line with those already reported: "Performance in 125 branch offices of a major New York bank, measured by turnover data and by the number of lost accounts per teller, was \textit{inversely} associated with the educational achievements of those 500 workers." \textit{Id.}

\textsuperscript{61} 29 C.F.R. \S 1607.3 (1974).

\textsuperscript{62} 444 F.2d 791, 798 (4th Cir. 1971).

\textsuperscript{63} \textit{Id.} at 798 n.7; accord, United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971) ("necessity connotes an irresistible demand").
It seems obvious that for virtually any specific educational criterion, more effective alternatives are available. An educational credential, as evidence of the applicant's ability to perform particular tasks, is both too broad and too narrow a requirement. It is overbroad because many courses necessary to obtain the credential have no relevance to the job skills required. It is too narrow because it unduly limits an applicant's presentation of evidence that he possesses necessary skills.

Since "Congress has commanded . . . that any tests used must measure the person for the job and not the person in the abstract," an employer must not require more of the person applying than is necessary for the job. For example, if algebra is needed for the job, a test with 80 percent algebra and 20 percent calculus is overbroad for that job. So, too, if the job requires a high degree of English reading and writing proficiency, a test which includes sections for foreign language translation or composition is too broad. In several decisions the Fifth Circuit has recognized that the requirement of a high school diploma suffers from the defect of overbreadth, and has suggested the use of tests more narrowly tailored to measure the actual job abilities sought. In United States v. Georgia Power Co., the court declared that "[m]any high school courses needed for a diploma (history, literature, physical education, etc.) are not necessary for these abilities. A new reading and comprehension test . . . might legitimately be used for this job need." Moreover, in Pettway v. American Cast Iron Pipe Co., the court summarized this objection to education credentials by noting that "[t]he high proficiency level established by this standard [high school] not only precludes qualified employees but also is not refined sufficiently to measure the ability sought by the company." Thus, whatever ability or skill an employer is seeking it seems that there will always be a test more narrowly constructed and therefore more likely actually to evaluate those skills than an educational credential.

64. "The catalogue of such alternatives is rapidly growing. The development of several new paper and pencil tests which purport to measure traditional aptitudes in a more culturally balanced way has been mentioned. Another possibility is the work sample approach to testing, under which a selected series of work tasks are substituted for a paper and pencil test. This technique has long been a staple in the selection of typists and stenographers and is now being expanded in demonstration studies to cover a wide range of jobs." Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach, 82 Harv. L. Rev. 1598, 1668-69 (1969).

65. 401 U.S. at 436.


67. 494 F.2d 211, 238 (5th Cir. 1974).
Overbreadth is not the only infirmity inherent in credentialism. A criterion which requires certain skills or knowledge that is admittedly job related, but which accepts only certain types of evidence of that skill or knowledge, is too narrow. It unfairly excludes from consideration those applicants who possess the qualifications but present the wrong evidence thereof. Job-related skills and knowledge can certainly be acquired in school, but they obviously can be acquired elsewhere, as well. Although not articulated in terms of “narrowness,” this objection appears to have been recognized by the courts. In *Pettway v. American Cast Iron Pipe Co.*, the defendant claimed that the criterion used to select applicants was not really a high school diploma or equivalent, but “rather a criterion used to select applicants who had obtained a sufficient educational level to successfully complete the International Correspondence courses relating to the craft for which they were entering an apprenticeship . . . .”68 It argued that the high school diploma or equivalent was merely the acceptable evidence of “sufficient educational level.” The Fifth Circuit responded:

Here, we understand the company to mean that a certain reading level and familiarity with study techniques is necessary to participate in the course work of the apprentice program. This cannot be *equated* with a requirement for a high school education or its equivalent. This Court, in fact, affirmed a district court's condemnation of a similar rationale for a high school educational criterion in *Georgia Power* . . . .69

In addition, the Supreme Court has observed that “[h]istory is filled with performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.”70

The equating of a credential with specific skill attributes clearly excludes those with the abilities but without the educational attainment. Alternative proof of actual ability can be readily conceived. If the required skill is blueprint reading, a degree in engineering may well evidence such ability. But the credential itself merely indicates where the skill was obtained. A more specific test could easily demonstrate possession of the skill independent of where it was learned, *i.e.*, in school or through individual industry. In this context, it may be noted that the armed forces utilize analogous screening devices to predict a person's performance in a number of capacities. Professor Berg found that

> [d]ata on the performance of military personnel [sic] in technical and other schools support the assertion that there are better predictors of the learning and “trainability” capabilities of personnel than formal educational achievement. There is scarcely a single

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68. *Id.* at 237.
69. *Id.*
70. 401 U.S. at 433.
program in the Armed Forces for which discrete measures of aptitudes, weak as they may be, are not much better predictors of performance than educational achievement.71

In sum, the rationale for using educational credentials appears weak. With alternatives available, an employer faces substantial difficulty in establishing that the discriminatory educational requirement is in fact and in law a business necessity. Because credentials have the inherent infirmity of being too broad and too narrow to serve as useful tools for the evaluation of job related qualifications, their use as employment criteria should be severely circumscribed. Criteria that are less broad can better predict ability to perform required tasks, without being obscured by often unrelated scholastic achievements; and criteria that are not so narrow will permit demonstration of ability regardless of whether the skill was obtained through formal schooling. The elimination of credentialism is entirely consistent with traditional American notions; as one court has said, "Wed as we are to the Abe Lincoln-Horatio Alger tradition in this nation, such a requirement except in exceptional cases would be hard to justify."72

The Courts Uphold the Employer: A Critique of the Contrary Cases

The courts have generally recognized the discriminatory impact of the educational credential requirement.73 Once the burden of justification has shifted to the defendant, however, some courts have had considerable difficulty applying the standards set out in the EEOC guidelines and approved in Griggs.74

Moreover, the difficulty of justifying the use of educational credentials as employment criteria has not prevented employers from attempting to meet the burden, and they have sometimes prevailed in the courts. Some courts have simply allowed employers to circumvent the Supreme Court-approved EEOC validation procedures described above.75 Furthermore, no court allowing credentials to remain as a barrier has addressed the fundamental question of alternatives and the corollary arguments of overbreadth and overnarrowness.76

71. BERG, supra note 22, at 18.
73. In Goodloe v. Martin Marietta Corp., No. C-2498 (D. Colo. Jan. 13, 1972), reprinted in 7 CCH Emp. Prac. Dec. 6989 (1974), the court found a discriminatory impact, but apparently did not realize it. "Admittedly, there are probably fewer blacks, percentage wise, who can meet the educational tests than there are whites. But that is the most that plaintiff has shown." Id. at 6991.
74. See, e.g., 401 U.S. at 432.
75. See text accompanying notes 57-59, 61 supra.
76. See, e.g., Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972);
The courts that have grappled with validity have mastered the form, but not the substance necessary for proper analysis of the issue. Perhaps one should not view these early efforts too harshly, since these courts confronted unfamiliar scientific and technical problems. Nevertheless, cause for alarm exists when the courts fumble the most basic issues of validation, for more difficult technical issues are waiting in the wings.\footnote{Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Arnold v. Ballard, No. C73-478 (N.D. Ohio Jan. 31, 1975), reprinted in 9 CCH Emp. Prac. Dec. ¶ 9921, at 6831 (1975); Goodloe v. Martin Marietta Corp., No. C-2498 (D. Colo. Jan. 13, 1972), reprinted in 7 CCH Emp. Prac. Dec. 6989 (1974).}

**Castro v. Beecher**

Two decisions,\footnote{Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972).} both upholding use of an educational requirement, serve as particular examples of the pitfalls previously encountered and errors hopefully to be avoided in the future. \textit{Castro v. Beecher},\footnote{459 F.2d 725 (1st Cir. 1972).} a First Circuit decision, exhibits a serious misapprehension of the standards applicable to justification of a credentialism requirement. The plaintiffs attacked civil service policies concerning employment of policemen in Massachusetts.\footnote{334 F. Supp. 930, 934 (D. Mass. 1971), aff'd, 459 F.2d 725 (1st Cir. 1972).} Among the practices questioned was a requirement that the applicant possess a high school diploma. Since the case was brought under sections 1981 and 1983, prior to the 1972 amendments to Title VII, the court was not compelled to adhere to the rigors of the EEOC guidelines.\footnote{See, e.g., 459 F.2d at 737-38. Although the EEOC Guidelines were promulgated under the statutory authority of Title VII, the extremely close parallels between actions under Title VII and actions under sections 1981 and 1983 have led several courts to conclude that the guidelines are applicable to actions under sections 1981 and 1983. \textit{E.g.,} Fowler v. Schwarzwalder, 351 F. Supp. 721 (D. Minn. 1972); Western Addition Community Org. v. Alioto, 340 F. Supp. 1351 (N.D. Cal. 1972). See cases cited note 32 supra.} Accepting \textit{arguendo} that a high school requirement eliminated more minorities than nonminorities, the district court turned to the justification argument. Relying on the report of the President's Commission on Law Enforcement and Administration of Justice, \textit{The Challenge of Crime in a Free Society}, the district court concluded that the requirement of a high school diploma "is obviously significantly related to job performance as a policeman."\footnote{334 F. Supp. at 938.} Apparently satisfied with this conclusion, the court cut off further inquiry:
Under those circumstances it is quite irrelevant that a validation study showing that the possession of a high school diploma . . . was not made . . . or that a large percentage of present-day Massachusetts or Boston policemen do not have high school diplomas, or that the percentage of blacks who have high school diplomas is far lower than the percentage of whites who have that educational badge.\textsuperscript{83}

The stance of the district court is difficult to reconcile even with the facts upon which it relied. Although the President's Commission did recommend recruiting on college campuses, the commission was particularly concerned with recruiting minority personnel and recognized that educational standards could be a significant obstacle to this goal:

"Quality" also means personnel who represent all sections of the community that the police serve. It scarcely needs stating that a college education does not guarantee that its recipient will be able to deal successfully with people whose ways of thought and action are unfamiliar to him. As this chapter has also shown, a lack of understanding of the problems and behavior of minority groups is common to most police departments and is a serious deterrent to effective police work in the often turbulent neighborhoods where those groups are segregated . . . . A major, and most urgent, step in the direction of improving police-community relations is recruiting more, many more, policemen from minority groups.\textsuperscript{84}

The court overlooked perhaps the most significant statement of the commission in this regard: "[R]ecruitment from minority groups will be all but impossible in the immediate future if rigid higher education entry standards are instituted for all police jobs."\textsuperscript{85} It is strange indeed that in relying on the commission's report the district court considered "quite irrelevant" a situation about which the commission had expressed grave concern.

In affirming the decision, the First Circuit stated simply that "[t]hese reports and the subsequent action of the Massachusetts legislature [in instituting the degree requirements] constituted a deliberate value judgment that professionalization of the police is a major goal in our increasingly complex society."\textsuperscript{86}

Whether the circuit court intended "professionalization" to con-
note a meaning different from "quality" as that term was employed by the President's Commission is not clear. In any event, the court of appeals patently failed to grasp the substance of the Griggs decision. In Griggs a vice president of the Duke Power Company had testified that the educational requirement was instituted on the basis of the company's judgment that it would improve the overall quality of the work force. The Supreme Court, however, rejected this evaluation as a valid ground for maintaining the requirement because "[t]he evidence . . . shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used." 87 The clear import of Griggs is that "value judgments" that have a discriminatory impact, whether "deliberate" or not, are impermissible unless they actually measure the applicant's ability in relation to the requirements of the job. 88

Although both the lower and appellate courts in Castro recited the language of Griggs, the substance of the Supreme Court's decision was largely misunderstood or ignored. The district court erred in its failure to require statistical proof of the correlation between the credential and job performance, while ironically relying on a report that seems to compel a result contrary to that reached by the court. The circuit court erroneously applied Griggs by assuming that value judgments are an acceptable justification for criteria which have a discriminatory impact. The value judgment that must control is the policy contained in Title VII, which requires that an employer prove by statistically valid means that criteria having a discriminatory impact are necessary to evaluate the applicant for the job.

Spurlock v. United Airlines, Inc.

The second credentialism case deserving scrutiny is Spurlock v. United Airlines, Inc., 89 a Tenth Circuit decision. The educational requirement at issue in Spurlock was a college degree, which perhaps explains the court's leniency; greater reluctance on the part of courts to set aside the educational criterion might be expected when it consists of a college degree rather than a high school diploma. Nevertheless, removal of college degree requirements where they do not actually predict job performance seems legally mandated if the principles of Title VII are carefully analyzed and applied. 90 As one commentator noted:

87. 401 U.S. at 431-32.
88. Id. at 432.
89. 475 F.2d 216 (10th Cir. 1972).
90. "It is likewise a violation of Title VII, absent a showing of business necessity, to require blacks, as a condition of being accepted into the company's management training program, to possess a college degree when such educational requirement, while
The reluctance of courts to tamper with such requirements is understandable, given the faith that American society has always reposed in education. But it ignores the substantial discriminatory impact which educational requirements can have, without justification, on minority group employment.91

In *Spurlock* the plaintiff had applied for employment as a flight officer with United Airlines. He had previously accumulated 204 hours of flight time and had completed two years of college. According to employment information circulated by United, he met the minimum job qualifications.89 The company had, however, raised its requirements between the time that the plaintiff obtained the information and the time that his application was filed. An internal company memorandum set forth the new employment policy:

In view of the current status—with approximately 189 flight officer applicants in process—we suggest the following guidelines be used in placing candidates into process. (1) College degree; (2) 500 hours of flight time (minimum); (3) Commercial license and instrument rating; (4) Age 21 to 29.93

The plaintiff reapplied prior to filing suit, having reached the required five hundred hours of flight time; the only deficiency in his qualifications was lack of a college degree.94 The plaintiff experienced little difficulty in establishing the discriminatory impact of the requirement.95 The court then turned to the question of justification for the criterion. Several aspects of United's argument, accepted unquestioningly by the Court, are nonetheless quite suspect.

The company presented statistics relating to the flight time requirements and the Appellate Court concluded that "[t]he statistics clearly showed that 500 hours was a reasonable minimum to require of applicants to insure their ability to pass United's training program."96


93. 330 F. Supp. at 229.
94. See id. at 230.
95. The plaintiff established a prima facie case by showing that United processed only nine black flight officers out of a total of 5,900. Cf. id. at 231.
96. 475 F.2d at 218-19. The following graph was the primary evidence submitted by United (with the statistical explanation by the court):

<table>
<thead>
<tr>
<th>No. of Hours</th>
<th>No. of Trainees</th>
<th>No. of Failures</th>
<th>Failure Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>200 or less</td>
<td>352</td>
<td>32</td>
<td>9%</td>
</tr>
</tbody>
</table>

The statistics presented were for the period February 1965 through April 1967 and were based on United's experience with approximately 1300 trainees, 82 of whom did not complete the training program. The statistics produced the following results:
For the college degree requirement, however, no statistical studies were introduced. In lieu of statistics the court accepted the testimony of United officials "that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program." It seems obvious that this testimony, unsubstantiated by significant statistical evidence, does not suffice to justify discriminatory policies. Nevertheless, even were a statistical correlation established between the successful completion of United's training program and possession of a college degree, the criterion chosen seems erroneous. The relevant criterion would seem to be job performance rather than completion of the training program. The court neglected any discussion of a correlation between a college degree and safety records, supervisors' evaluations, or even scores within the training program.

The court also neglected to consider alternative correlation procedures. In this light, for a correlation to have significance, it must be contrasted with alternative correlations. For example, four years of college might be compared to a two year program; even if a college degree correlated with completion of the training program, further statistical analysis would be required to conclude that two years of college are not equally correlated to success in the training program. From the statistics reprinted in the circuit court opinion, it appears that flight time was the only significant presage of success in the training program. United virtually conceded as much at trial:

<table>
<thead>
<tr>
<th>Flight Time Range</th>
<th>Number</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>201 to 500</td>
<td>128</td>
<td>14%</td>
</tr>
<tr>
<td>501 to 1000</td>
<td>154</td>
<td>8%</td>
</tr>
<tr>
<td>1001 to 1500</td>
<td>175</td>
<td>5%</td>
</tr>
<tr>
<td>1501 to 2000</td>
<td>168</td>
<td>2%</td>
</tr>
<tr>
<td>2001 to 2500</td>
<td>119</td>
<td>2%</td>
</tr>
<tr>
<td>2501 to 3000</td>
<td>89</td>
<td>2%</td>
</tr>
<tr>
<td>3001 to 5000</td>
<td>118</td>
<td>2%</td>
</tr>
</tbody>
</table>

Id. at 219 n.1. One commentator has suggested that even for flight time this showing is not statistically significant. Note, Employment Discrimination—Building Up the Headwinds, 52 N.C.L. Rev. 181, 186 (1973).

97. The district court referred to studies made by United relating to college degrees. 330 F. Supp. at 235. This reference, however, seems to have confused the statistical studies made in regard to flight time with the United official's testimony that a college degree was an indication of ability to retain concepts.

98. 475 F.2d at 219. For an interesting analysis demonstrating how misleading such unsubstantiated "indications" can be, see Making It in College Without a High School Diploma, 96 Mo. Lab. Rev. 45 (July, 1973). In fact, however, it seems clear from United's internal memorandum that the purpose in increasing the educational requirements was not to increase trainability, but to limit the number of applicants.

99. 475 F.2d at 219. A careful analysis of the statistics utilized by the court with regard to the correlation of flight hours to successful completion of the training program indicates that the correlation exists regardless of credential attainment. Since the statistics were for the period February 1965 through April 1967, much before the company raised its education requirement from two to four years of college in April 1969, it is
United admits that this college requirement is the least important of its qualifications and that the degree requirement is occasion-
ally waived when the more important qualification of flight time is particularly good.\textsuperscript{100}

Ironically, on two other occasions, United waived the flight time re-
quirement in favor of white applicants.\textsuperscript{101} Since plaintiff had the relevant qualifications, the degree requirement should not have precluded his entry into the training program.\textsuperscript{102}

Taken as a whole, Castro and Spurlock seem weak authority for courts entertaining future credentialism suits. Although the occupa-
tions—policemen and airline pilots—involved in the two cases might conceivably fall within an "exceptional" category, the evidence pre-
sented in those cases fell far short of establishing any such exception. Once a discriminatory impact is found to exist, courts must scrutinize the "meaningful study" presented as proof of the validity of the criteria to insure that it is in fact what is purports to be. Nonstatistical studies are of doubtful value. If in fact a statistical correlation is established between the requirement and the elements of the job, alternatives must be considered. In virtually every instance, a specific, criterion-refer-
cenced test will predict work performance better, with a less discrimina-
tory impact. Educational credentials should enjoy no more deference than general intelligence examinations, which have been regularly struck down as employment criteria\textsuperscript{103} in favor of tests that "measure the person for the job and not the person in the abstract."\textsuperscript{104}

\textbf{Remedies Under Title VII}

The foregoing discussion has attempted to demonstrate that a plaintiff in a Title VII suit should have little trouble establishing evident that even if the correlation of flight time with success in the training program is statistically significant, it is unaffected by the fact that the company hired noncollege graduates. See note 96 supra.

100. 330 F. Supp. at 235.
101. \textit{Id.} at 231.
102. \textit{Cf.} Berg, \textit{supra} note 22, at 153: "In none of the Air Force's studies does edu-
cational achievement account for more than a marginal portion of the substantial vari-
ations observed in the performance of very sizeable numbers of airmen who have com-
pleted a large number of the most diversified courses."
104. Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). Particularly troubling is the situation in which both testing and educational credential requirements are at-
tacked, but the court chooses to deal only with the tests. The fact that one requirement is found to be discriminatory hardly relieves the court of the obligation to investigate other potentially discriminatory criteria properly before the court. The court in Commonwealth v. Glickman, 370 F. Supp. 724, 730 n.6 (W.D. Pa. 1974), however, appears to have concluded otherwise.
a prima facie case of discriminatory impact on minorities ensuing from the use of educational credentials as employment criteria, and that an employer should encounter substantial difficulty in justifying credentialism under most circumstances if Title VII principles are properly applied. Assuming that the employer is found to have violated the act, the question of the appropriate remedy in a Title VII credentialism case remains. Although a detailed discussion of remedies is beyond the scope of this article, those remedies applicable to the special problems of credentialism will be briefly explored.

**Injunctive Relief**

Clearly the most simple and effective remedy for the discriminatory use of educational credentials is their elimination. Unlike a single exam that has a discriminatory impact, a credential requirement is difficult to modify into a evaluative criterion related to the skills actually required for the job. Owing to the nature of credentialism, an injunction is the only practicable first step in rectifying the harmful consequences of the practice. The Fifth Circuit has recently maintained its strong stance against such discriminatory practices, holding that a lower court's failure to enjoin a credential requirement was reversible error. Citing the major decisions in the circuit, *Georgia Power Co.*, *Johnson v. Goodyear*, and *Pettway*, the court stated,

> In the fast moving world of Title VII law, important decisions of this court have supervened the decision of the district court.... These decisions make it clear that the district court should have enjoined the use of the education requirement.

**Financial Redress**

In addition, whether the educational credential is a barrier to employment or to promotion, those persons unfairly denied access to the desired job suffer financial loss. Any remedial decree, in addition to enjoining the discriminatory practice, must therefore award monetary compensation to those discriminated against. Title VII specifically contemplates grants of back pay in discrimination cases and the


106. Duhon v. Goodyear Tire & Rubber Co., 494 F.2d 817 (5th Cir. 1974).

107. 474 F.2d 906 (5th Cir. 1973).

108. 491 F.2d 1364 (5th Cir. 1974).

109. 494 F.2d 211 (5th Cir. 1974).

110. 494 F.2d 817, 819 (5th Cir. 1974).

111. 42 U.S.C. § 2000e-5(g) (Supp. III, 1973) provides that the court may order “such affirmative action as may be appropriate, which may include, but is not limited
courts have generally been receptive to such relief. As one court has said,

Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII . . . a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.\textsuperscript{112}

Moreover, unlike testing procedures which have a discriminatory impact only after the applicant has applied for the job and taken the test, educational credentials are self-excluding. If a minority individual knows that a particular company's hiring procedure requires a degree that he does not have, his course of action may be determined by the discriminatory impact of the credential requirement. As the EEOC has observed, "[W]itness testimony establishes that Negroes often are deterred from bidding on a job because of stated high school education requirements."\textsuperscript{113}

Some courts have already grappled with this problem. It appears that notwithstanding the difficulties of identification, if a plaintiff is able to certify such a class of nonapplicants, it will be as eligible as a class of rejected applicants for back pay consideration\textsuperscript{114}. In view of the self-excluding nature of a credential requirement, it is important that the courts thus take cognizance of plaintiffs who have not applied for jobs because of credentialism. Increasing the class of plaintiffs to include those who were deterred from applying has the salutary effect of both reimbursing persons who have actually been discriminated against, and further encouraging voluntary curtailment of the widespread practice of credentialism\textsuperscript{115}

Financing the Litigation

Finally, since Title VII cases are ordinarily brought by those who

to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be responsible for the unlawful employment practice) . . . ." Back pay liability against states is precluded, however, by the Eleventh Amendment. Cf. Edelman v. Jordan, 415 U.S. 651 (1974).

\textsuperscript{112} Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973).

\textsuperscript{113} EEOC Decision No. 75-047 (Oct. 21, 1974), reprinted in 9 CCH EMP. PRAC. DEC. ¶ 6441, at 4172 (1974).


\textsuperscript{115} "I firmly believe that the real incentive or catalyst for compliance with Title VII laws in employment will be the potential liability for large damage awards." McDonald, Remedies for Racial Violations, LABOR LAW DEVELOPMENTS 1, 26 (1974).
have been deprived of employment in some fashion, financing an action against the employer might well be an impossible burden. In an effort to mitigate the financial burden, Congress has provided explicit authority for an award of attorneys' fees. Interpreting the statute, the First Circuit Court of Appeals noted in Johnson v. Georgia Highway Express, Inc.:

This court as part of its obligation "to make sure that Title VII works," has liberally applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation.

The statutory provision for attorneys' fees also allows special interest foundations to finance anticredentialism actions, with a reasonable expectation of eventual reimbursement. The "revolving fund" concept has been used successfully by the NAACP and the private bar through the Lawyers Committee and can be of great assistance in attacking credentialism.

Conclusion

This article has focused primarily on the disadvantages faced by minorities as the group of last entry into a work force governed in large part by credential requirements. Although prospective minority employees are the primary beneficiaries of an attack on credentialism via Title VII, society in general is also likely to benefit. If employers are prohibited from using credential requirements as employment criteria, many of the collateral ill effects traceable to credentialism can be severely curtailed or eliminated. Both minority and nonminority individuals who apply for employment may be confident that the only criteria legally available to determine their eligibility will be those which measure individual abilities in relation to the skills required for the job, not whether one has endured to completion the formal educational system. Evidence of such competency will not be limited to a paper proof that constrains options for development of personal potential. The educational system, at least to some greater degree will be free to concentrate on those cognitive skills that have traditionally been its respons-

116. "In any action or proceeding under this title, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 2000e-5(k) (1970), as amended (Supp. III, 1973); see Falcon, Award of Attorneys' Fees in Civil Rights and Constitutional Litigation, 33 Md. L. Rev. 379, 396-411 (1973); Nussbaum, Attorneys' Fees in Public Interest Litigation, 48 N.Y.U.L. Rev. 301 (1973); Note, Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees, 41 U. CINN. L. Rev. 405 (1972).

117. 488 F.2d 714 (5th Cir. 1974).

118. Id. at 716; accord, Fowler v. Schwarwalder, 498 F.2d 143 (8th Cir. 1974).

sibility; new organizational arrangements can be devised for those non-academic activities important to movement into adulthood and the work force. Finally, employers will be forced to rationalize their hiring procedures. A hiring system based on individual ability and merit, fairly and honestly measured, can only improve productivity and employee satisfaction. The arbitrary placement of employees on the basis of credentials, compounded by the failure to distinguish between those credentials produced by superior ability and those garnered through sheer financial staying ability, can be replaced with relevant rational, criterion-referenced approaches to the hiring process.

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