Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One

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CREDENTIALISM AND
THE PROLIFERATION OF FAKE DEGREES:
THE EMPLOYER PRETENDS TO NEED A DEGREE;
THE EMPLOYEE PRETENDS TO HAVE ONE

Creola Johnson*

ABSTRACT

A report from the U.S. General Accounting Office recently exposed 463 federal employees with degrees from schools believed to be "diploma mills"—sham schools that sell college degrees to individuals who complete little or no academic work to earn them. This report, along with other investigative work, confirmed the claims of diploma mill operators: their "graduates" have well-paying jobs in all levels of both the public and private sectors, and employers have subsidized the purchase of fake degrees via tuition reimbursement programs. For a growing number of positions, employers prefer college students and graduates over workers with only high school diplomas, even when a

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college education is not necessary for competent job performance. As a result, employers are partially responsible for the fake degree demand through the practice of credentialism – overly relying on degrees as proof of job competency. Faced with a diminishing pool of well-paying jobs and fearing their employers are unfairly holding them back, some workers pretend to have earned degrees, purchasing them to obtain coveted jobs or promotions. This article posits that by relying on higher education credentials as proof of competency when filling low-to-moderate-skill positions, employers risk violating Title VII of the Civil Rights Act to the extent that such credentials are not a business necessity and job-related and such reliance has a disparate impact on groups protected by the Act. To deter the demand for fake degrees, this article explores several solutions, including recommending that employers adopt effective testing procedures to find competent workers. To encourage the attainment of legitimate degrees, employers can cultivate partnerships with community colleges to allow workers to acquire relevant skills through two-year degree programs. Furthermore, government initiatives such as work-study programs and tax incentives can help persons without degrees obtain entry-level positions and concurrently pursue legitimate postsecondary education.

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INTRODUCTION

In 2003, email offers of online degrees made America Online's list of top ten spam mail subjects.¹ The majority of online companies claiming to be colleges or universities are not accredited by any agency recognized by the United States Department of Education (the "Education Department").² Many of these schools are "diploma mills," companies that sell degrees to consumers without requiring them to do any substantial course work to obtain the degrees.³ The academic community views these degrees as

¹. Press Release, AOL Service, America Online Releases 'Top 10 Spam' List of 2003 (Dec. 31, 2003), http://www.timewarner.com/corp/newsroom/pr/0,20812,670181,00.html (last visited July 20, 2006). The email advertisement above never mentions the name of any particular degree-granting institution. See E-mail from Flora Reese, to Katherine Delaney, Law Student (June 25, 2005, 02:09 EST) [hereinafter Fast Track University Degree Program]; see also JOHN BEAR & MARIAH BEAR, BEARS' GUIDE TO EARNING DEGREES BY DISTANCE LEARNING 40-44, 64-65 (15th ed. 2003) (identifying degree solicitations as among the top ten spam mail messages).

². BEAR & BEAR, supra note 1, at 61.

³. No universal definition for the term "diploma mill" exists, and some experts count as diploma mills unaccredited schools that require completion of substantial academic work that is nonetheless inferior to work required at traditionally-accredited schools. See ALLEN EZELL & JOHN BEAR, DEGREE MILLS 20-21, 60 (2005). No one knows the number of existing diploma mills but experts estimate the number at roughly 2,000. Id. at 60.
worthless because they do not represent academic achievement. However, some older non-traditional students are attracted to these degrees because they can use them to obtain employment, promotions, and raises. As explained below, holders of fake degrees use them to obtain jobs and raises; therefore, obtaining bogus degrees is usually profitable although unethical.

When conducting an investigation of diploma mills, the United States General Accounting Office ("GAO") discovered just how easy it is to obtain authentic-looking credentials: it purchased a degree package for $1,515 for Senator Susan Collins from Lexington University, a non-existent school supposedly located in New York. The package included two printed diplomas (a bachelor's degree in biology and a master's degree), honors distinctions, academic transcripts, and telephone verification services.

A 2004 GAO report revealed that 463 federal employees, including 28 senior-level employees, had obtained degrees from diploma mills and unaccredited schools. Charles Abell, the Principal Deputy Under Secretary of Defense for Personnel and Readiness, was exposed by the GAO report for obtaining a master's degree in human resource

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4. See id. at 109 (asserting that two types of people buy diploma mill degrees: "those who hope and plan to use them with employers and potential employers, and ... those who simply want to impress people."). Despite a news story in which a diploma mill operator was arrested for selling a fake degree to CBS reporter Mike Wallace, over 800 people contacted CBS to obtain the phone number and address of the diploma mill so they could purchase a degree like Mike Wallace did. Id.

5. Despite a name change to the General Accountability Office, the reports cited in this paper refer to it as the General Accounting Office, the office's title at the time the reports were created. See General Accountability Office, GAO's Name Change and Other Provisions of the GAO Human Capital Reform Act of 2004, http://www.gao.gov/about/namechange.html.


7. Id.; Nightly News: Government Employees Using Fake Degrees Paid For With Tax Dollars To Get Better Jobs And Pay Raises (NBC television broadcast May 10, 2004) (transcript available at LEXIS, News Library) (stating that Collins received a Bachelor of Science degree in Biology and a Master of Science degree in Medical Technology and was given a transcript listing a grade-point average of 3.80 based on several grades and courses, including an "A" in Introduction to Sociology; and a "B" in Spanish II).

management from Columbus University.9 This degree purportedly prepared Abell to perform numerous personnel management functions required of his senior-level position.10 In response to the outrage the report evoked, Abell protested loudly, “I did the coursework. I turned in the papers. I took the tests.”11 The problem, however, was that Columbus University was considered a diploma mill by experts and government regulators and was ultimately shut down by the State of Louisiana.12 Columbus University gave academic credit for “life experiences” and only required its students to “take five classes, read a book and pass a test or write a paper.”13 Abell and most of the employees exposed by the GAO retained their jobs,14 although a few employees were terminated or forced to resign.

No organization comparable to the GAO exists for the private sector, but there is little doubt that fake degrees also pose a problem for private employers. A recent investigation uncovered at least 80 companies with senior-level managers holding degrees from 18 different diploma mills.16


10. Abell is responsible for:
providing staff advice to the Secretary of Defense and Deputy Secretary of the Defense for total force management as it relates to manpower; force structure; program integration; readiness; reserve component affairs; health affairs; training; and personnel requirements and management, including equal opportunity, morale, welfare, recreation, and quality of life matters. See Abell’s Bio, supra note 9.


13. See Ly, supra note 11; Stephanie Grace, Judge Orders Phony College: Out of State Litany of Abuses Persuades Judge, TIMES-PICAYUNE (New Orleans), Aug. 14, 1998, at B2 (enumerating several practices justifying the shutdown of diploma mill, including giving “academic credit for life experiences such as playing tennis or golf, keeping tropical fish and planning a trip”).

14. See Ly, supra note 11 (quoting Abell: “[m]y bosses have been supportive and I appreciate their support”).

15. See, e.g., id. “Dr.” Laura Callahan, former senior director in the U.S. Department of Homeland Security’s Office of the Chief Information Officer, was forced to resign after the GAO report revealed she had obtained three degrees from a diploma mill. Id.

16. See Christopher Byron, Fee For Certificate - Executive Resumes Padded by Sheaves of Faux Sheepskin, N.Y. POST, June 7, 2004, at 41 (In a search of filings by companies to the United States Securities & Exchange Commission, “15 different chairmen and CEOs, 29 corporate board
To add fuel to the fire, the GAO not only uncovered employees with bogus and unaccredited degrees, but also reported that federal agencies, in violation of federal law, had reimbursed employees over $169,000 for tuition fees paid to obtain these degrees. According to the GAO, federal agencies have likely understated the extent to which federal dollars have gone to bogus and unaccredited schools. Although at this point the federal government is believed to be the largest subsidizer of diploma mill degrees, private employers may also be substantially subsidizing the billion-dollar diploma mill industry by unknowingly allowing tuition reimbursement funds to pay for fake degrees.

Despite the prevalence of fake degrees, the author neither rushes to the side of employers to comfort them as victims of degree fraud nor excuses sellers and buyers of fake degrees. This article focuses on how employers play a substantial role in the demand for fake degrees by demanding a more educated workforce and overly relying on education credentials as proof of job competency. Job applicants pretend to have college degrees because employers purport to need them as a means to a

17. Federal law permits the federal government to pay for the cost of federal employees to obtain degrees from only a college or university accredited by a nationally recognized body. See 5 U.S.C. § 4107(a) (2000).

18. See GAO REPORT NO. 1, supra note 8, at 6. One reason for the understatement is that some employers think a school is accredited because many bogus and unaccredited schools use names similar to reputable accredited schools—Columbus University versus Columbia University, for example. Id. at 5. See also State of Michigan, Non-Accredited Colleges/Universities [hereinafter Michigan's List of Non-Accredited Colleges/Universities], http://www.michigan.gov/documents/Non-accreditedSchools_780907.pdf (revised July 7, 2005) (listing over 650 non-accredited colleges/universities) (last visited Aug. 2, 2005).


20. See EZELL & BEAR, supra note 3, at 60.

21. The connection between employer demands and degree fraud has not escaped lawmakers. See, e.g., Bogus Degrees and Unmet Expectations: Are Taxpayer Dollars Subsidizing Diploma Mills?: Hearings Before the S. Comm. on Governmental Affairs, 108th Cong. 6 (2004) [hereinafter Bogus Degrees Senate Hearings], available at http://s257.g.akamaitech.net/7/257/2422/07sep20041200/www.access.gpo.gov/congress/senate/ pdf/108hrg/94487.pdf. Senator Frank Lautenberg stated: "More and more employers want job applicants with graduate degrees. So the pressure to have academic credentials is growing. Some people want to cut corners to meet the criteria needed to get a job or be promoted. Others are well-meaning in their pursuit of a degree, but they get duped." Id. at 6.
prerequisite for employment. As a result, the fake degree problem reflects an inefficiency or at least an inequality in the labor market. By preferring college graduates over high school graduates to fill low-to-moderate-skill positions, employers are unfairly closing the door to high school graduates by denying them the chance to demonstrate competency through their work history or on-the-job training. Instead of proposing punitive measures to punish sellers and buyers of fake degrees, this article promotes positive solutions that encourage employers to allow people lacking four-year degrees to have greater access to jobs that pay well and/or have career advancement potential.

Part I of this article describes the proliferation of bogus degree providers and explains how easy it is for such providers to create websites for non-existent colleges and market their degrees. Bogus degree providers misrepresent their accreditation status and the legitimacy of awarding degrees based on prior life experiences.

Part II describes the demand for bogus degrees and posits that employers are responsible for creating a demand for substandard degrees by engaging in the practice of credentialism: they require jobs be filled with degree-holders even though a college education is not necessary for competent job performance. While several labor economic theories may justify an employer's reliance on academic credentials, economic theory can also be used to justify the actions of competent employees who buy bogus degrees. The competency of Abell and others to perform their jobs was not called into question until the GAO exposed

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22. See Linda Seebach, For Sale: College Degrees Integrity Sold Separately, ROCKY MTN. NEWS, July 17, 2004, at C13, available at 2004 WLNR 1264055 (“There is a lot of mindless credentialism around. I remember a joke from the Soviet era, where people who were paid in virtually worthless rubles said, ‘they pretend to pay us, and we pretend to work.’ One might say, ‘they pretend to need a college degree, and I pretend to have one.”’).  
23. This article treats the fake degree problem as a labor market inefficiency and does not address the equally daunting problems that fake degrees create for higher education policymakers.  
24. Whether or not individual employees should be terminated or treated as criminals for obtaining bogus and unaccredited degrees is the subject of another article. See Creola Johnson, Degrees of Deception: Are Consumers and Employers Being Deceived by Online Universities and Diploma Mills, 32 J.C. & U.L. 411 (2006) (proposing enactment of a statute criminalizing certain practices of owners of fake and unaccredited schools and proposing a five-factor test for employers to use when determining what disciplinary action should be taken against employees holding degrees from such schools). Note that, in most states, it is not illegal to use a fake or unaccredited degree for employment purposes. Id. at 167-70 (discussing reasons why criminal sanctions are not recommended as appropriate disciplinary action against employees with substandard degrees).  
25. See infra Part I.A.  
26. See infra Part I.B.  
27. See infra Part II.A.  
28. See infra Part II.B.
their diploma mill degrees. Employers, as rational actors, concluded that these employees were competent and productive and, therefore, retained them despite their lack of legitimate credentials.  

Part III analyzes employment discrimination law. It explains why employers should not rely on education credentials to fill job positions to the extent that such reliance is not a business necessity and job related and such reliance has a disparate impact on groups protected by anti-discrimination laws.  

Using a hypothetical fact pattern, Part III demonstrates how employers who prefer college students and graduates when hiring for manual labor positions may be vulnerable to liability under anti-discrimination laws.

Part IV recommends that employers adopt a partial non-credentialism policy by changing their hiring practices to fill low-to-moderate-skill positions based on assessments of skills actually necessary for competent job performance. When employers reasonably deem college education a prerequisite for certain jobs, Part IV recommends that employers improve their credential checking procedures so that no one is able to secure a job, raise, or promotion using a fake or substandard unaccredited degree. The article also recommends that employers increasingly forge partnerships with community colleges to fill those positions because community colleges, unlike four-year institutions, provide education that is generally accessible and affordable to all and that is designed to meet employer needs. To foster the pursuit of legitimate higher education credentials and to prevent college graduates from completely monopolizing access to all well-paying jobs, Part IV proposes that the U.S. Congress offer tax incentives and modify the federal work-study program to make on-the-job training positions available to high school seniors and graduates.

29. See infra notes 201-03 and accompanying text.
30. See infra Part III.A-B.
31. See infra Part IV.A. See also infra notes 355-60 and accompanying text (discussing the "Work Readiness Credential" test, which if passed by a high school graduate, will demonstrate his or her ability to perform several low-to-moderate skill positions).
32. See infra notes 368-79 and accompanying text.
33. See infra notes 361-67 and accompanying text. See also infra Part II.C (explaining that because community colleges are generally affordable and accessible and because they offer customized degree and training programs for numerous occupations, employers should look to community colleges to find employees to fill positions requiring low-to-moderate skills).
34. See infra Part IV.B.
I. PROLIFERATION OF FAKE DEGREES: THE HIJACKING OF ONLINE HIGHER EDUCATION

Because of advances in information technology, the ability to provide online education has produced nothing short of a revolution in higher education. This technology has broadened access to higher education for many students who would not have been able to obtain that education before its inception. At the same time, the internet has become a haven for non-traditional education providers, ranging from diploma mills—unscrupulous entities that simply sell bogus or counterfeit degrees—to online schools that actually provide some education but lack any accreditation recognized by the Education Department. The majority of Americans believe that a college education is necessary for success, and labor and education statistics confirm that perception. On their websites and in their spam mail, diploma mills not only highlight the need for college degrees, but convince working consumers that because of their employment histories, they already deserve degrees without doing additional academic work.

35. See David Noble, Technology and the Commodification of Higher Education, 53 MONTHLY REV. 26, 30 (June 17, 2004) (“[D]istance education has ... assumed the aura of innovation and the appearance of a revolution itself, a bold departure from tradition, a single step toward ... radically transformed higher educational future.”); Ronald Roach, Technology: Riding the Waves of Change, BLACK ISSUES HIGHER EDUC., June 17, 2004, at 92.


37. See Johnson, supra note 24, at 444 (noting that some experts include in the definition of diploma mills, schools that may require significant work but the work is nevertheless substantially inferior to work required by reputable accredited schools). See also EZELL & BEAR, supra note 3, at 15 (noting that throughout the latter part of the twentieth century, policy makers have engaged in a pattern of expressing concern over the problem of diploma mills, listening to demands for action, but not following up with permanent solutions).


39. Almost all of the top 50 well-paying jobs require college degrees, and as a person’s educational attainment increases, so does the person’s earnings. See Johnson, supra note 24, at 423-426; infra notes 173-76 and accompanying text.

40. See, e.g., Bogus Degrees Senate Hearings, supra note 21, at 19 (stating that a diploma mill operator “sought to prey upon people who could be convinced that they deserved a college or graduate degree”). An acceptance letter from the diploma mill operator would145(609,965),(872,997)
Therefore, email messages offering diploma mill degrees are appealing to some individuals, particularly those who feel they are already qualified but believe employers are unfairly denying them jobs or raises because they lack college degrees.

A. The Internet and Email Facilitate the Supply of Fake Degrees

Until the 1990s, "distance learning" was essentially correspondence education delivered via the now-outdated medium of postal services, where a consumer picked up an envelope and later returned it to the sender with the course completed. The internet, computers, and fiber-optic cable are the new technologies for distance education being widely used by traditional higher-education institutions and well-known, for-profit schools like the University of Phoenix Online. Besides these institutions, hundreds of little-known, for-profit entities are offering degrees completely online by advertising a low-cost, schedule-friendly way to obtain degrees. Many of these online degree providers are diploma mills.

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the prestige they deserved just because they have not obtained the appropriate degree. Your intelligent decision, however, will not permit this travesty to happen to you." Id.

41. See DAVID F. NOBLE, DIGITAL DIPLOMA MILLS 3-5 (2002).
42. Id. at 6.
43. The University of Phoenix, also known as the University of Phoenix Online, is accredited by the Higher Learning Commission and is a member of the North Central Association. The University of Phoenix and the University of Phoenix Online is often used interchangeably, however, this practice is incorrect because the University of Phoenix is an accredited traditional school with a physical campus. See University of Phoenix Online: Earn Your Degree from an Accredited Institution of Higher Learning, http://www.uopxonline.com/Accreditation_accredited_online_universities.asp (last visited July 27, 2005). See generally Johnson, supra note 24, at 430-34 (describing the process by which online schools can obtain accreditation).
44. See, e.g., William M. Bulkeley, The Best Way to go to School: Looking to Learn on the Web? Start By Studying All the Options, WALL ST. J., Dec. 6, 1999, at R18 (stating that obtaining a degree online has several advantages, including price, over attending traditional colleges at physical campuses). See also Johnson, supra note 24, at 417-22 (explaining the advantages and disadvantages of online education and reviewing research about the effectiveness of online instruction and learning).
45. The majority of schools categorized as unaccredited claim they are accredited by an accrediting agency not recognized by the Education Department, and of the 200-plus active unrecognized accreditors, "only one has even a remote chance of recognition" by the Education Department. See BEAR & BEAR, supra note 1, at 64-65.
Although diploma mills have been around a long time, they have proliferated in the latter half of the twentieth century. The number of fake and substandard unaccredited degrees can only be estimated because providers and holders of such degrees are not going to voluntarily admit their involvement in the proliferation of these degrees. However, in 1985, congressional testimony revealed some startling data. The National Council for Accreditation of Teacher Education stated that an estimated one out of six education doctorates is fraudulent. Even more disturbing, an extrapolation of the percentage of people holding fake diplomas in the medical field revealed potentially two million "bogus practitioners" in the United States. The testimonial evidence concluded that at least 500,000 Americans held fake degrees. Under an aggressive operation called DipScam (for diploma scam), the Federal Bureau of Investigation ("FBI"), along with other law enforcement agencies curtailed the growth of fake degree providers by successfully prosecuting numerous individuals in the 1980s and early 1990s.

Unfortunately, the rapid growth of the internet and the emergence of email marked a new era in the supply of fake degrees. In a recent book on diploma mills, Allen Ezell, former agent and chief of the FBI's DipScam operation, and John Bear, an academic and former FBI consultant, expose the world of education fraud and show how diploma mills have become a billion-dollar industry that has sold at least one million fake degrees. Over 300 diploma mills operating in the United States are selling degrees for up to a few thousand dollars each, awarding as many as 500 doctorate degrees every month, and earning $200 million in annual revenue. The number of fake degrees most

46. See EZELL & BEAR, supra note 3, at 32 (stating that diplomas mills have been around since the 8th Century and reporting that the Association of Home Study Schools claimed to have 750,000 students enrolled in their schools).
47. See id.
48. Id. at 33.
49. Id.
50. Id.
51. See id. at 34, 55.
52. Id. at 55-56 (stating that the internet is a dream for diploma mill owners; it has provided them with the resources necessary to make their operations more difficult to detect as well as increase their profitability).
53. Id. at 59-70.
54. See Are Current Safeguards Protecting Taxpayers Against Diploma Mills?: Hearing before the Subcomm. on 21st Century Competitiveness of the H. Comm. on Education and the Workforce, 108th Cong. 14-21 (2004) (statement of Jean Avnet Morse, Executive Director, Middle States Commission on High Education). See also EZELL & BEAR, supra note 3, at 78 (estimating the
likely exceeds one million, given the cost of sending one million messages at one time can cost as little as $100\textsuperscript{55} and as many as one out of three persons responding to spam mail may buy a fake degree.\textsuperscript{56} By using spam mail to mass market fake degrees, diploma mill providers can operate anonymously in a world of almost universal access to email and, thereby, make use of spam's primary advantages: ease of distribution, very high potential audience, and extraordinarily low distribution costs.\textsuperscript{57} American citizens living abroad are responsible for sending millions of spam messages during their operation of the University Degree Program ("UDP"), reputed to be the largest diploma mill ever.\textsuperscript{58} Before being shut down by the U.S. Federal Trade Commission ("FTC"),\textsuperscript{59} UDP's operators earned over $400 million in sales of over 200,000 bogus degrees sold primarily to consumers living in the United States and Canada.\textsuperscript{60} UDP's spam messages offered "a prosperous future, money-earning power, and the admiration of all," to consumers paying prices ranging from $500 to $8,000.\textsuperscript{61} Depending on the cost of the package purchased, the consumer would obtain a bachelor's and/or advanced degree, including medical degrees, and extensive verification services, such as providing transcripts and letters of recommendation from purported professors from over 20 different universities.\textsuperscript{62} Based on the consumer's attestation about the sufficiency of his or her life experiences to justify the degree(s) requested, the consumer obtained the university degree(s) without taking exams, attending classes, reading

\textsuperscript{55} See EZELL & BEAR, supra note 3, at 78.
\textsuperscript{56} Id. at 14. Spam is technically referred to as unsolicited commercial email. See EZELL & BEAR, supra note 3, at 78.
\textsuperscript{57} See Timothy O'Brien, A Dollar Short: The Impact of the Can-Spam Act of 2003 on Illinois Businesses, 37 J. MARSHALL L. REV. 1289, 1290 (2004) (explaining the reasons for popularity of spam as a mass-marketing tool and stating that the number of email accounts is expected to surpass 1.2 billion by the year 2005).
\textsuperscript{58} See EZELL & BEAR, supra note 3, at 201-02.
\textsuperscript{60} Id.; Johnson, supra note 24, at 453-55 (discussing the FTC's enforcement action against the principals of the UDP program and settlement agreement, under which the principals agreed to pay the FTC $57,000 and cease operations).
\textsuperscript{61} See EZELL & BEAR, supra note 3, at 201-02; see also Kari Haskell, That's Dr. Haskell, If You Please, N.Y. TIMES, Mar. 11, 2001, at 45 (stating that the author contacted UDP and was offered a Ph.D. in communications for $1,900, a price later reduced to $1,000 with \textit{cum laude} or \textit{summa cum laude} distinction added at no extra cost).
\textsuperscript{62} See EZELL & BEAR, supra note 3, at 201-03.
books, or undergoing knowledge-assessment interviews. While the principals of UDP had to pay a fine and cease all operations, including closing websites for their fake schools, they were not criminally prosecuted and are believed to still be in business under new names and web addresses.

The availability of the internet, spam mail, and other technologies makes it easy for diploma mill operators to resurrect online diploma mills even after agreeing to shut down their operations. First, one can easily buy an internet domain name from a provider such as Register.com, which among other things, registers the .com, .net, and .org domain names that are used as website addresses. For instance, Regis University, a reputable traditional school, recently filed a trademark infringement lawsuit against several defendants selling fake degrees for St. Regis University under numerous registered domain names such as “http://saintregis.edu.lr,” “saintregisedu.org,” “saintregis-online.org,” and “sru-edu.net.” Also, because of errors on the part of Educause, the only entity with the authority to grant the “.edu” suffixes for internet websites, diploma mill operators can further assume the appearance of legitimacy via an “.edu” suffix. Recently, the GAO’s Office of Special Investigations (OSI) proved how easy it was to create a fictitious graduate-level foreign school by registering a website for Y’Hica Institute for the Visual Arts, purportedly located in London, England. OSI not only succeeded in creating a website for Y’Hica, but, by using counterfeit documents, OSI received certification from the Education Department to participate in the Federal Family Education Loan Program.

63. Id. at 202-03; Haskell, supra note 61.
64. See Haskell, supra note 61; Johnson, supra note 24, at 455.
65. The internet, email, and other technologies have also created a world in which these operators can hide from American law enforcement and/or operate from foreign countries with little or no laws to regulate them. See Johnson, supra note 24, at 453-44 (discussing an FTC enforcement action against principals operating outside the US).
66. See EZELL & BEAR, supra note 3, at 183.
68. See EZELL & BEAR, supra note 3, at 178-79; Zach Patton, Senate Committee To Give Diploma Mills The Third Degree, CONG. DAILY 4, May 10, 2004, available at 2004 WLNR 17660884 (stating that “[t]he Internet also grants pseudo-authority to diploma mills because institutions need not meet any standards to obtain an ‘.edu’ Web address” and that no one has ever made “any attempt to screen that, [even though] that’s pretty easy to do”).
69. See GAO REPORT No. 2, supra note 8, at 1.
70. Id. at 1-2 (stating that the Education Department has now taken action “to guard against the vulnerabilities that were revealed by our investigation”).
Along with registering websites for a phony school, the degree provider can set up email addresses for their websites and, due to the anonymous nature of email, conceal their identities as webmasters by supplying inaccurate information to the domain name registrars. In the case of diploma mill St. Regis University, one of the owners used different email addresses, including “info@universityservices.net.” To actually stop these persons, investigative work is necessary to locate those using the internet to perpetrate degree fraud.

By using subject lines calculated to induce consumers to open their email messages, diploma mills effectively utilize spam mail. Pennsylvania’s Attorney General recently sued Trinity Southern University and its principals for violations of consumer protection and anti-spam laws based on various practices, including selling fake degrees using the email subject line “Virus Alert from Your ISP.” The defendants allegedly sent more than 18,000 spam mail messages promoting the sale of their online degrees. The defendants also used the servers of the Pennsylvania State Senate and more than 60 businesses to send spam mail, forged identification and routing information to prevent anyone from tracing the spam mail back to the defendants, and used random words in the spam messages to confuse and bypass spam filtering technology.

71. See Fraudulent Online Identity Sanctions Act: Hearing on H.R. 3754 Before Subcomm. On Courts, the Internet, and Intellectual Property, 108th Cong. 47 (2004) (statement of Bob Goodlatte, Committee on House Judiciary Subcommittee on Courts, Internet, and Intellectual Property) (discussing how fraudulent domain name registration is a problem and stating that “while many Internet users wish to maintain anonymity, this information is crucial to law enforcement officers trying to locate and detain criminals who use the Internet to perpetrate crimes, including those who falsify their identities to perpetrate crimes against children.”).


73. See id. Using WHOIS, the plaintiff was able to determine that domain name registrant was “Lorhan, H, SRU, 80 Broad St, Monrovia.” Id. at 38. The defendant was not in the capital of Liberia, Monrovia, but in Spokane, Washington. Id. at 2.

74. See EZELL & BEAR, supra note 3, at 183.


76. See Pennsylvania Complaint, supra note 75, at ¶ 7).

77. See id. at ¶ 7-8. The complaint also accuses the defendants of fraudulently claiming that Trinity Southern University:

[i]s a legitimate institution that can issue academic undergraduate, graduate and doctoral degrees in several majors[,] [o]ffers legitimate transcripts, including a list of classes,
After setting up email accounts and launching spam mail, the diploma mill operator can maintain anonymity by setting up a foreign bank account to receive payment from consumers by bank wire or Western Union. Next, the diploma mill operator can hire cheap labor by setting up a "boiler room" equipped with low-paid workers, telephones, printers, and other equipment necessary to sell, print, and mail the fake degrees, and provide degree verification services to deceive prospective employers about the legitimacy of the consumer's degrees.

Also crucial to the success of a diploma mill is the selection of a name. Diploma mill operators select names that sound like the names of existing prestigious American or foreign schools. This is a safe move so long as the likelihood of a trademark infringement suit is minimal. Believing a lawsuit to be improbable, the principals being sued by Regis University no doubt picked the name "St. Regis University" because it was close, but not identical, in name to the legitimate Regis University. The principals recently settled the lawsuit and are now enjoined from using the designation Regis University, or anything similar.

In summary, modern technology has made it fairly easy for unscrupulous people to set up sham schools with names similar to traditional reputable schools and mass market fraudulent degrees over
the internet. The discussion now turns to the deceptive practices used by diploma mills to lure consumers.

B. To Attract Consumers, Bogus Degree Providers Misrepresent Accreditation and Give Credit for Life Experiences

Some may question why consumers are enticed to obtain bogus degrees considering the potential negative consequences flowing from their detection. Although the complicity of employees in obtaining degrees from diploma mills is not a focus of this paper, recent congressional hearings lead to the conclusion that some employees are actually victims of diploma mill operators. Moreover, the GAO Report suggests the simplest reason why some employees obtain fake degrees is that they are successful in using the degrees to get jobs, raises, and promotions. In spite of all the media attention given to the findings of the GAO Report and other diploma mill investigations, most people

84. See supra notes 64-81 and accompanying text. These same individuals can also use such technologies to create unaccredited schools that require some academic work, but whose academic requirements are usually inferior to those required by traditional schools. See, e.g., Thomas Bartlett & Scott Smallwood, Degrees of Suspicion:\ Maxine Asher Has a Degree for You, CHRON. OF HIGHER EDUC., June 25, 2004, at A12. Maxine Asher started her own college named American World University (AWU). Id. Notice the similarity in AWU's name to American University, located in Washington, D.C. Despite the similarity in names, Asher runs AWU from her Los Angeles apartment and boasts an enrollment of more than 7,000 students, including 2000 from China. Id. She also insists that students must complete some type of dissertation or thesis paper, but whatever the work-load, it was not enough to keep Louisiana from rejecting her license to operate in that state. Id. at 13; Paul Schwartzman, Johnson Deputy Defends Doctorate, WASH. POST, May 21, 2004, at B9 (stating that Maxine Asher created her own accrediting agency which is not recognized by either the U.S. Department of Education nor the district-based Council on Higher Education Accreditation). In another law review article, the author discusses the growth in unaccredited online schools and the various state and federal laws which can be employed to shut down diploma mills, and recommends criminal prosecution of owners of unaccredited schools for failing to make proposed disclosures. See Johnson, supra note 24, at Part III.

85. In 2004, eleven Georgia school teachers and 90 Indiana auto workers, all graduates of Saint Regis University, suffered serious consequences, including termination of employment. See EZELL & BEAR, supra note 3, at 70.

86. See Johnson, supra note 24, at 485-89 (recommending standard for determining when employees have been complicit in degree fraud and, therefore, are deserving of discipline, including termination).

87. See, e.g., Bogus Degrees Senate Hearings, supra note 21, at 63. In hearings about diploma mills, Senator Susan Collins reported many are truly victims and feel that they do not have "an easy way to check on whether an institution [requiring some academic work,] like Columbia State University or Kennedy-Western[,] is a legitimate academic institution." Id.

88. See generally GAO REPORT No. 1, supra note 8 (listing examples of several federal government employees that had obtained degrees from diploma mills in order to advance in their careers as well as obtain raises).
exposed for having degrees from alleged diploma mills have retained their positions. Some consumers may be drawn to diploma mills because the majority of four-year colleges and universities are increasingly becoming inaccessible and unaffordable for independent low-income earners.

Besides the inaccessibility and unaffordability of many traditional four-year institutions, one need only look at two common practices of fake degree providers (discussed below) to understand how some consumers are lured and sometimes deceived. These deceptive practices are described so that the reader can understand how an unsophisticated consumer, lacking any college education, could be convinced that a degree based on life experiences is legitimate and that a school granting such a degree is accredited. These practices are also described to make the point that employers who fail to properly investigate the degree-granting institution are unwittingly aiding degree fraud when they hire and promote individuals with fake degrees.

Bogus degree providers usually disseminate misleading and sometimes false statements about their accreditation status. Trinity College & University is a classic example of such deception. On the right side of Trinity’s home page is an official-looking design with the word “Accredited” prominently featured. If one clicks on this design, the

89. See, e.g., Ly, supra note 11.
90. See Johnson, supra note 24, at 427-29 (discussing the accessibility and affordability of four-year institutions and comparing these institutions with community colleges and online unaccredited schools); Samuel Kipp III, et. al., Unequal Opportunity: Disparities in College Access Among the 50 States, 4 LUMINA FOUND. FOR EDUC. NEW AGENDA SERIES 1, 6 (Jan. 2002), available at http://www.luminafoundation.org/publications/monographs/pdfs/monograph.pdf. An institution is inaccessible if it “is selective, that it generally enrolls the more highly qualified applicants, and that it is unlikely to be accessible to typical college-bound high school graduates.” Id. at 2. This research considered students “independent” when they do not receive parental income. Id. at 19. If the sum of a student’s average “Expected Family Contribution” “and the average financial aid available to them were equal to or greater than their estimated average annual expenses at a particular college, then the college was considered affordable.” Id. at 2. But see, David L. Warren, The Lumina Foundation Misses its Opportunity, 5 UNIV. BUS., Mar. 2002, at 56, available at http://www.universitybusiness.com/page.cfm?p=73 (criticizing the methodology of the authors of Unequal Opportunity Disparities of College Access Among the 50 States).
91. See EZELL & BEAR, supra note 3, at 103-06 (providing a list of ‘92 things bad and fake schools do to mislead people”).
92. See id. at 126, 245. Michigan lists Trinity as an unrecognized unaccredited school as well. See, e.g., Michigan’s List of Non-Accredited Colleges/Universities, supra note 18. Trinity is considered by the US Army and the State of Oregon to be a diploma mill and has been sued for copyright infringement for using a name too similar to Trinity University, a reputable traditional school in Texas. See Guillermo Contreras, Trinity Sues To Protect Name; An Alleged Diploma Mill Using the Same Name Charges $695 For A Bachelor’s Degree, SAN ANTONIO EXPRESS-NEWS, Apr. 16, 2004, at B1.
following statement appears under a caption entitled "Membership and Accreditations": "Trinity College & University has been approved by the Association of Private Colleges and Universities, and is Accredited by the Association for Online Academic Excellence." 93 This association is not an accrediting agency recognized by the Department of Education,94 but claims to be a recognized accreditor of numerous online schools.95

In addition to misrepresenting accreditation, bogus degree providers create an incorrect impression about the education they offer and the academic credit they give for life experiences.96 Trinity, which offers bachelor's degrees for merely $675,97 boldly dismisses traditional teaching methods and equates quality education with a combination of what one has previously learned and a questionable amount of coursework from Trinity.98 "If the college credit earned is from Prior Learning Assessment, [earning a degree] can take as little as two days or

93. Trinity College & University: Membership and Accreditations, http://www.trinity-college.edu/member_acre.html (last visited July 27, 2005). Experts state that the number of legitimate but unrecognized accrediting agencies is "a very, very small number." BEAR & BEAR, supra note 1, at 40.


95. The Ass'n for Online Academic Excellence: About Us, http://www.carltoncu.com/aoex/index2.html (last visited July 27, 2005). But see Johnson, supra note 24, at 430-34, 437 (describing America's accreditation process and stating that entities like the Association for Online Academic Excellence are nothing more than accrediting mills).

96. Even unaccredited schools that require completion of alleged substandard academic work go to great length to convince students that the work is substantial and on par with traditional accredited schools. See Johnson, supra note 24, at 439-44 (describing in detail Kennedy-Western University, an unaccredited school accused of requiring substandard academic work).

97. Now the reader may be convinced that Trinity is a diploma mill, especially after learning that a bachelor's degree costs only $675. Trinity College & University, Trinity Fees, http://www.trinity-college.edu/fees.html (last visited July 27, 2005) [hereinafter Assessment of Fees].

98. See Trinity College & University, http://www.trinity-college.edu/index.html (last visited Mar. 9, 2005). The following paragraphs appear on the left side of Trinity's home page:

Education as a Process, not a Place!

Trinity College and University gives qualifying adults the opportunity to convert what is learned in life into college degrees, whether that knowledge is from professional or other accomplishments, work, religious or military training or other sources. You may have qualifications now to earn a college degree or college credits by our assessment of your prior learning, testing or portfolio. Our evaluation and assessment may lead to the award of a degree! Or perhaps a Certificate in certain specified areas of study.

Id. (emphasis supplied). On its page entitled "Frequently Asked Questions," Trinity states that less than three percent of its students actually earn a degree based on their prior experiences, implying course work will be required by 97 percent of applicants. Trinity College & University, Frequently Asked Questions, http://www.trinity-college.edu/faq.html (last visited July 27, 2005).
as long as a year or more, depending upon the quality of the application and cooperation of the applicant in gathering documentation requested.99 Trinity claims to give credit for prior learning experiences100 in accordance with recommendations from the Department of Education.101 No such recommendations exist; therefore, Trinity falsely represents that it complies with such recommendations.102 While accredited schools sometimes give academic credit for certain non-collegiate experiences, their standards for granting such credit usually differ vastly from the standards followed by diploma mills and many unaccredited schools.103

Trinity College & University and its principals are permanently enjoined from using the word “Trinity” after recently settling a lawsuit with Trinity University, the legitimately-accredited and reputable school located in San Antonio, Texas.104 Trinity University filed a trademark infringement lawsuit against the diploma mill after learning that Trinity University was incorrectly identified as the source of a Philadelphia

99. Id.
100. Trinity asserts that it does not give credit for mere “life” experiences but for prior learning experiences, such as knowledge acquired during employment. TRINITY COLLEGE & UNIVERSITY, CREDIT EVALUATION, http://www.trinity-college.edu/credit_exp.html (last visited July 27, 2004) (“College credit is NOT and shall NEVER be offered for life experience.”).
101. Assessment of Fees, supra note 97. Trinity’s explanation of its crediting practice reads as follows:

Fees are NEVER based upon the amount of credit earned, if any, but so-called ‘diploma mills’ use this tactic to the discredit of legitimate organizations that attempt to practice the standards of PLA [prior learning assessment] in compliance with recommendations of the U.S. Department of Education. In other words, our fees are based upon the work involved in assessing the number of units assessed and NOT the number of units awarded.

Id.
103. See, e.g., Bogus Degrees Senate Hearings, supra note 21, at 39. When Lieutenant Commander Claudia Gelzer enrolled in a master’s degree program at Kennedy-Western University, she was given substantial academic credit for her prior experiences. Id. But Gelzer’s survey of 1,100 accredited institutions revealed only 6 percent of them offering credit for life experiences at the master’s degree level. Id. Some diploma mills explicitly state that awarding degrees based on life experience is legal due to a loophole in existing law. See, e.g., Fast Track University Degree Program, supra note 1 (referring to “a legal loophole allowing some established colleges to award degrees at their discretion”).
school official's fake degree purchased over the internet.  

"Dr. Faridah Ali," who later pled guilty to fraud and racketeering, used her bogus credentials to get a charter-school grant and other benefits. Evidently, no one involved in conferring grants or awarding contracts thought to verify the legitimacy of her credentials or the degree-granting institution. This case demonstrates how employers, through their failure to follow thorough credential-checking procedures, play a role in the proliferation of fake degrees. Neither Ali nor the 453 employees exposed by the GAO report could have profited from their bogus degrees had employers actually investigated the degree providers. The discussion now turns to proving a more difficult assertion—employers also bear some responsibility for the spread of fake degrees by overly relying on college degrees when making hiring and promotion decisions.

II. CREDENTIALISM: EMPLOYER'S ROLE IN FOSTERING DEMAND FOR BOGUS DEGREES

Credentialism usually refers to the employers' over-reliance on college degrees in making hiring decisions. Credentialist theory posits

106. Kitty Caparella, Philadelphia School Official Pleads No Contest to Fraud, Racketeering, PHILA. DAILY NEWS, Sept. 26, 2005, at 6 ("Ali told the judge she had a Ph.D. based on her 'life experiences,' but failed to mention it was bought on the Internet from a diploma mill, as evidence entered earlier in two trials showed."); Schweiker Administration Awards Charter-School Planning Grants, PR NEWSWIRE, Dec. 5, 2001 (stating that Ali received $10,000 to fund charter school Liberty Academy).
107. See RANDOM HOUSE UNABRIDGED DICTIONARY 473 (2d ed. 1993) (defining credentialism as "excessive reliance on credentials esp. academic degrees in giving jobs or conferring social status"). See David Bills, Creeping Credentialism in the United States and Germany: Changing Relationships Between Educational Credentials and Occupational Assignment, 3-4 (2004) [hereinafter Creeping Credentialism], available at http://www.iuperj.br/rc28/papers/bills%20rc28%20brazil%20hiring%20trends.pdf (stating that a consensus is lacking in the sociological literature about the meaning of term "credentialism"). By credentialism, some refer to the propensity of employers to select candidates on the basis of their educational qualifications presented at the point of hire. See, e.g., Educational Credentials and the Labor Market: An Inter-Industry Comparison, in GENERATING SOCIAL STRATIFICATION: TOWARD A NEW RESEARCH AGENDA 173-99 (Alan C. Kerckhoff ed., 1996) (stating that credentialism is "the preoccupation of employers with employees having crossed one or more educational status thresholds"). Another view of credentialism refers to the persistent societal trend towards ratcheting up educational requirements for specific occupations. David Bills, Credentials, Signals, and Screens: Explaining the Relationship Between Schooling and Job Assignment, 73 REV. EDUC. RES. 441, 450 (2003).
108. See Bills, supra note 107, at 452. Professor Bills theorizes about the cause of credentialism:

Credentialism was produced by several factors, including educators' conscious (and sometimes unwitting) expansion of higher education, changes in labor market
that because employers operate under widely-held societal assumptions about formal education, employers do not efficiently use educational credentials in hiring decisions and, therefore, "make choices that are nonrational, unreflective, and at least potentially counterproductive." Empirical research does not prove employers' assumptions that formal education produces more productive workers. In fact, some research has found an inverse relationship between worker productivity and the amount of formal education received. Credentialist theory does not posit that productivity and education are unrelated or that schooling does not impart any skills. Instead, the theory asserts that the correlation between productivity and education is smaller than the correlation between compensation and education. Upon reflection, one can usually think of instances where a college-educated person was not the best person for a particular job position. American history is replete with individuals who, although lacking a college degree, transformed American life through their entrepreneurial and innovative spirits, some even becoming millionaires in the process.

The assertion that employers, via credentialism, are partially responsible for the demand for fake degrees cannot be proven empirically; nevertheless, the assertion is highly plausible. As recruitment patterns, and other circumstances with less direct bearing on job training, such as land speculation interests tied to college-founding and the initial absence of government regulation of education.

Id. Another view of credentialism is that formal education leads to individual socioeconomic success not because of any superior skills or knowledge the educated person possesses but because of the "ability of the highly educated to control access to elite positions." Id.

109. See Bills, supra note 107, at 452

110. See Daniel Rossides, Knee-Jerk Formalism: Reforming American Education, 75 J. HIGHER EDUC. 667, 676 (2004) (discussing various research, including work done by pioneer Ivar Berg, that "found no relation between formal education required for particular occupations and work productivity, low absenteeism, low turnover, work satisfaction, or promotion").

111. Id.

112. See Bills, supra note 107, at 452 ("Even the most skeptical observers of the productive value of what is learned in school concede that at least some schooling-acquired skills and capacities are of enough interest to employers to make their use of educational credentials for hiring a sound business practice.").

113. See, e.g., infra note 404 and accompanying text (providing the example of Steve Jobs, chief executive officer and co-founder of Apple Computer and of Pixar Animation Studios). See also Paul Starobin, Take that Degree and Shove It, 26 NAT’L J. (ABSTRACTS) 2544 (1994), available at 1994 WLNR 3437143 (identifying Bill Gates, Steven Spielberg, Jeffrey Katzenberg, and Thomas Alva Edison among the number of famous persons who did not obtain a degree but have achieved high levels of success).

114. If an attempt was made to do empirical research, one has to doubt that any significant number of employees would be willing to admit that they purchased sheepskins evidencing college degrees without completing any substantial academic work.
explained below, labor statistics show that employers are requiring that an increasing number of jobs be filled by college degree holders. Jobs traditionally taken by high school graduates are going to college students/graduates and employers are advertising that college students/graduates are “preferred” for those jobs. Very few of the 463 employees exposed by the GAO Report lost their jobs even though their degrees were from suspected diploma mills. Because most of these employees retained their jobs, one may reasonably conclude that they were performing their jobs competently even without the allegedly-necessary legitimate college degrees. These employees obtained degrees of dubious authenticity to signal to federal employers their competency and yet the degrees apparently were not necessary to meet the intrinsic demands of the jobs they were required to perform.

Numerous examples of blatant credentialism exist in the private and public sectors of America’s labor market, as well as in the international market. For instance, state and federal agencies have entry-level positions which are available only to college graduates regardless of their major area of study. Institutions of higher education have abetted employer demand for degree holders and have simultaneously created


116. See infra notes 161-63 and accompanying text.

117. See infra note 186 and accompanying text.

118. Id.

119. See generally Bill Samii, Analysis: The Problem with Iran’s Diploma Mills, RADIO FREE EUROPE, Sep. 24, 2004, available at http://rferl.org/featuresarticleprint/2004/09/d526607d-299e-40cd-a6df-6324a396767a.html. Credentialism is a global employment practice. For example, Iran has attributed the success of fake degree providers to the phenomenon called “madrak gerayi,” or “degree-ism.” “Madrak gerayi” refers to the increasing realization that post-secondary degrees lead not only to prestige, but to higher employment positions and accompanying salaries for those holding them. Id.

120. See Social Security Administration: Jobs in the Midwest: Outstanding Scholar Program, http://www.ssa.gov/chicago/jobs_os.htm (last visited July 27, 2005) (discussing jobs available under its Outstanding Scholar Program where the “[a]pplicants must be college graduates and have maintained a grade point average (GPA) of 3.5 or better on a 4.0 scale for all undergraduate course work, or have graduated in the upper 10 percent of their graduating class or major university subdivision, such as the School of Business Administration”). The Social Security Administration’s website states: “SSA has found that liberal arts graduates do very well at most entry-level positions,” which includes claims representatives. See Office of Personal Management: Agency Practices, http://www.opm.gov/Strategic_Management_of_Human_Capital/thsrc/FLX04050.asp (last visited July 27, 2005).
revenue-generating degree programs for occupations for which one would think a college degree is unnecessary.\textsuperscript{121} For instance, Saint Leo University in Florida offers a degree in Golf Course Management, which will teach students “how to do everything from selecting the right kind of grass, herbicides, fertilizers to filing reports with the Department of Environmental Protection to fixing the tractor.”\textsuperscript{122} This degree teaches students what has traditionally been learned by employees through on-the-job training or, at most, by completing a customized two-year associate’s degree program, thereby avoiding the expense of obtaining a four-year college degree.\textsuperscript{123}

Job predictions from the Labor Department indicate that almost all well-paying jobs will require at least an associate’s or bachelor’s degree.\textsuperscript{124} As illustrated in Ford’s and General Motor’s recent announcements to layoff 60,000 employees and close numerous

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\item \textsuperscript{121} For example, it seems every university has an MBA program but are these programs necessary? For a critique of MBA programs in America, see Carl Schramm, The Broken M.B.A., Chron. Higher Educ., June 23, 2006, at 16 (suggesting that MBA programs continue to grow because universities are able to secure “magnificent buildings, large endowments, and celebrity faculty members”).
\item \textsuperscript{122} Chase Squires, Proposal Links Golf Course with College, St. PETERSBURG TIMES, July 15, 1999, at 8. This degree not only enables Saint Leo to lure in new students, it also gives its “fledgling” golf team, which is “rebuilding,” a place to practice. \textit{Id.} For a review of the degree’s course requirements, see Saint Leo University: Golf Course Management Specialization, http://www.saintleo.edu/SaintLeo/Templates/Inner.aspx?durki=569&pid=569 (last visited July 27, 2005).
\item \textsuperscript{123} Community colleges and a few four-year institutions offer short degree or certification programs for jobs related to golf course management and turfgrass science. See, e.g., Pennsylvania State University: Golf Course Turfgrass Management, http://cropsoil.psu.edu/academic/gctmp/associateoption.cfm (explaining Penn State’s two-year Golf Course Turfgrass Management Program) (last visited July 13, 2005).
\item \textsuperscript{124} See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BLS RELEASES 2004-14 EMPLOYMENT PROJECTIONS [hereinafter Employment Projections], available at http://www.bls.gov/news.release/pdf/ecopro.pdf (stating that a bachelor’s or associate’s degree “is the most significant source of postsecondary education or training for six of the ten fastest growing occupations”); BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, TOMORROW’S JOBS 4 (2004) [hereinafter Employment Outlook], available at http://www.bls.gov/oco/oco2003.htm (“[T]wo broad groups of occupations are projected to grow most rapidly in the future...occupations that disproportionately require higher-than-average education levels, such as managerial, administrative, and professional jobs; and occupations that disproportionately require lower-than-average education levels, primarily service jobs”). Similar job predictions exist in other countries. See, e.g., Universities & Colleges’] Lines Blurring for Universities, Colleges, GLOBE & MAIL, Sept. 15, 2003, at US [hereinafter Lines Blurring for Universities]. Robert Giroux, president of the Association of Universities and Colleges of Canada in Ottawa, stated that over 1.1 million jobs requiring a college education were created in Canada between the years 1990 and 2001. \textit{Id.}
\end{enumerate}
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plants, 125 well-paying jobs requiring only a high school diploma and providing career advancement based upon job performance alone are rapidly diminishing. 126 Most Americans believe a college degree has now taken on the importance that a high school diploma once had, and the majority of parents believe that obtaining a college degree is essential for their children. 127

Empirical research indisputably shows individual attainment of higher education leads to greater earnings and other economic benefits. 128 However, critics of the role of higher education posit that educational degrees increase earning capacity, not because of particular knowledge and skills imparted to a degree holder, but because employers view the educational process as certifying that the degree holder possesses desirable basic skills and personal qualities. 129 As a result, credentialist theory views higher education as the monopolization of access to better-paying jobs and economic opportunities by holders of educational degrees and certificates. 130 Regardless of the economic labor theory (explained below) that one subscribes to, credentialism may, in the long run, create over-education, under-employment, declining

125. Mark A. Stein, Carmaking Bites Bullet: Other Industries Dine Well, N.Y. TIMES, Jan. 28, 2005, at C1 (stating that Ford announced that over the next six years it would shut down 14 factories and eliminate 30,000 jobs and GM would close 12 factories and eliminate 30,000 jobs).

126. For example, although approximately fifty colleges offer degrees in country club club management, these degrees are certainly not required for effective management of the club. See Jeanne Sahadi, Six-figure Jobs: This Week, A Look at Sailing the Seas, Giving a Good Dose of Medicine and Managing a Clubby Oasis, CNN/MONEY, May 25, 2004, http://money.cnn.com/2004/05/03/pf/six_figs_five/index.htm (stating that only 35% of country club managers obtained their management positions after acquiring relevant on-the-job training) (last visited July 24, 2006). See also Lines Blurring for Universities, supra note 124. Julie McDonald, a career counselor at Athabasca University (Canada), stated that she regularly encounters employees in the business sector who enroll because they need a Bachelor of Commerce degree to secure a job promotion. Id.

127. See IMMERWAHR & FOLENO, supra note 38, at 3. The article reports that 85% of the general public believe “a college education has become as important as a high school diploma used to be,” 77% of the general public believe that getting a college education today is more important than it was ten years ago. Id. at 38 tbl. B. About 62% of parents believe that it is “absolutely necessary” for their children to obtain college education. Id. These views are shared even more widely among Hispanics and African-American parents. Id. at 39, tbl. C.


129. See id. at 373. See also James Fallows, The Case Against Credentialism, 256 ATLANTIC MONTHLY 49 (1985) (approving the continuous testing requirements imposed on airline pilots because they were related to the tasks of the job, but stating that credentialism generally “[is] too restrictive in giving a huge advantage to those who booked early passage on the IQ train and too lax in [its] sloppy relation to the skills that truly make for competence”).

wages, and a declining return on educational investment. The more that credentials are required and the more people pursue credentials, the worse off will be the people who do not attain them. As a result, the economic and social gaps between those with college education and those without it will widen.

A. Economic Theories Explain the Relationship Between Educational Attainment and Subsequent Higher Earnings

Economists and social scientists have studied the relationship between jobs and educational credentials and have developed various theories to establish a correlation between educational attainment and socioeconomic success. While these theorists agree that a positive correlation exists between degree attainment and increased earnings, they draw distinctions between the skills actually attained by a college degree holder and the skills employers believe a degree imparts. These theories are relevant to this article's discussion because while they justify the actions of employees who attain postsecondary education, they do not justify employers' large-scale use of educational credentials as proof of competency. "Sociologists and economists have demonstrated for decades that educational attainment is consistently associated with occupational and economic status." Therefore, individuals who pursue degree attainment to improve their socioeconomic status act rationally. However, no theoretical or empirical research clearly demonstrates a positive relationship between degree attainment and skills necessary for successful job performance.

131. See, e.g., Edward J. McCaffery, Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change, 103 YALE L.J. 595, 633 (1993) (arguing that women committed to the labor market are likely to educate themselves excessively or inefficiently, due to labor market inefficiencies).

132. Factors such as bankruptcies, downsizing, restructuring and outsourcing all work together to create an unfair environment for those who do not have the correct credentials to fill the positions employers desire.

133. See infra notes 136-59 and accompanying text.


135. See Bills, supra note 107, at 460.
Consequently, employers may be acting inefficiently in awarding jobs on the basis of degree attainment.

Economist Gary Becker introduced the human capital theory, which, in contrast to credentialism, proposes that a person's investment in education and training translates into a higher value of human capital and higher worker productivity, which allows the worker to eventually command higher income and other valued benefits. According to this theory, education imparts abilities and skills relevant to successful job performance. Becker's human capital theory has been severely criticized and discounted because of its failure to explain the persistence of income gaps along gender and racial lines, particularly in instances where women and non-whites have similar credentials as their white male counterparts.

In the context of the American education system, David Labaree, criticizing human capital theory, advances the proposition that while trying to earn the grades and degrees necessary to obtain a well-paying job, students are unfortunately foregoing attainment of skill sets and


137. See Rosemary Hunter, The Gender Gap in Compensation Afterward: A Feminist Response to the Gender Gap in Compensation Symposium, 82 GEO. L.J. 147, 151 (1993) ("Human capital and individual choice theories allow white males to ignore the fact that they are the beneficiaries of the most thorough and effective affirmative-action program ever known."); McCaffery, supra note 131, at 633-34 (analyzing gender income disparities in inefficient labor markets); Jeffery G. Reitz, Occupational Dimensions of Immigrant Credential Assessment: Trends in Professional, Managerial and Other Occupations, 1970-1996, in CANADIAN IMMIGRATION POLICY FOR THE 21ST CENTURY 5 (Charles Beach et al. 2003) (discussing how human capital theory argues that an employers' search for the most productive workers should militate against employers acting in an undue and arbitrary manner against immigrants with foreign credentials, but finding that Canadian employers significantly discount the foreign credentials, and explaining that “[s]ome employers may tend to distrust the relevance of foreign qualifications because they lack familiarity with them, and because of a fear of the risks involved in ‘taking a chance’ on what may be seen as an unknown quantity”). Even when men and women have obtained higher education, women lag behind men in regards to income and types of jobs. See, e.g., Andre Tremblay, Equality of Access, Inequality of Results: Women and Higher Education Since 1960, 17 LONDON CONF. FOR CAN. STUD. 101 (2001/2002), available at http://www.bbk.ac.uk/lle/LCCS/lecs_journal_folder/lecs_journalfolder_vol17/lecs_journal_folder_vol17_1 (detailing a study about the participation of women in higher education in Canada and concludes that women do not as often obtain the quality of jobs that men obtain even though an increasing number of women are obtaining higher education in all disciplines). See also Edward N. Wolff, Productivity, Computerization, and Skill Change, 87 ECON. REV. (FED. RES. BANK OF ATLANTA) 63, 64 (2002) (stating that “[h]uman capital theory views schooling as an investment in skills and hence as a way of augmenting worker productivity,” but finding “no evidence that the growth of educational attainment has any statistically measured effect on industry productivity growth”).
proficiencies in certain areas that are required in the workplace. Due to consumerism in the public school system, Labaree asserts that parents and students have “commodified” education; consequently, educators are focusing on grading, sorting, and selecting students, instead of imparting relevant skills. Many value a degree from a four-year institution because it represents a “well-rounded” education and indicates that a person possesses certain basic skills and qualities, such as the ability to learn.

The time and money spent to get a well-rounded education at a four-year college may be an inefficient use of a person’s resources, particularly given that graduates of four-year colleges are taking jobs for which a college degree is unnecessary to competently perform. Some critics of the “college-for-all” movement argue that many students currently enrolled in college do not belong there because they are not adequately prepared for the academic work. Research suggests that college graduates with low functional literacy—the ones who arguably should not have gone to college in the first place—are precisely the ones who end up taking the high school jobs. As later explained, employers

138. See DAVID LABAREE, HOW TO SUCCEED IN SCHOOL WITHOUT REALLY TRYING: THE CREDENTIALS RACE IN AMERICAN EDUCATION 32 (1997) (“When students at all levels see education through the lens of social mobility, they quickly conclude that what matters most is not the knowledge they attain in school but the credentials they acquire there.”).

139. See id.; Jay Mathews & David Nakamura, A Sign of True Scholarship Or Just a Status Symbol?: Some Doubt Honor Rolls’ Academic Value, WASH. POST, Dec. 21, 1997, at ¶¶ 22-23 (stating students have become “cagey consumers” who put emphasis on grades and the honor rolls and on “admission to brand-name colleges” and that “[b]ecause they are not encouraged to love learning for its own sake, . . . they are like car buyers who do not want to pay full price and look for ways to acquire status items with the least effort”).

140. See LABAREE, supra note 138, at 32.

141. See infra notes 161-63 and accompanying text (discussing employer trend of preferring college graduates over non-graduates).

142. See Edwin S. Rubenstein, The College Payoff Illusion, at ¶ 13, http://www.calbaptist.edu/dskubik/college.htm (last visited July 28, 2004); David Boesel, The College Movement and Its Critics, 87 PHI DELTA KAPPAN 537, 538 (2001) (stating that many young adults lacking the ability or academic preparation necessary to perform well in four-year universities are nevertheless being encouraged to enroll in them, and universities increasingly admit students who have little chance of doing well).

143. See John Hood, College Degree’s Value is Questioned: Many Students May Not Need College to Maximize Their Economic Potential, TRIANGLE BUS. J. (Raleigh, N.C.), Oct. 10, 1997, available at http://www.bizjournals.com/triangle/stories/1997/10/13/editorial3.html (discussing a study published in the July 1997 issue of Monthly Labor Review by two professors and economists Frederic L. Pryor of Swarthmore College and David Schaffer of Haverford College); Boesel, supra note 142, at 538. Critics of the college-for-all movement make several key points, including that many university graduates are not faring well in the labor market and that graduates often find themselves in low-paying service positions and other positions not traditionally associated with degree attainment. Id.
that need college-educated workers may be better served, not by hiring graduates from four-year institutions, but by hiring graduates from community colleges and vocational schools which offer customized degree and certification programs that impart practical work skills. Accordingly, personal investment in human capital via community college would be a more rational use of a person's time and money to signal competency to employers.

The limitations of the human capital theory have led to the development of a number of other theories to explain employers' use of educational requirements and the relationship between educational attainment and subsequent earnings. On the supply side of the labor market, Michael Spence's signaling theory states that since the labor market is characterized by imperfect asymmetric information, education is used as a signal to identify to employers the more able, ambitious, or productive workers. Individuals, therefore, invest more in education in order to distinguish themselves from other job applicants and attain employment. Among those who subscribe to the signaling theory, no agreement exists on whether schooling actually imparts skills that increase an individual's productivity.

On the demand side of the labor market, economists have developed a "screening" theory to explain how employers respond to the imperfect information available about a worker's capabilities:

144. See infra Part II.C. See also Douglas Basharov, College Degree Unnecessary, USA TODAY, Oct. 2, 2003, available at http://www.usatoday.com/news/opinion/editorials/2003-10-02-oppose_x.htm (asserting that a degree from a four-year college institution is unnecessary for Head Start teachers, for whom strong knowledge of child development is more important; such knowledge may be obtained through either specialized training or from a two-year institution).

145. See Boesel, supra note 142, at 538-39 (stating that because many drop-outs of four-year colleges perform poorly in the labor market, they might have fared better had they instead enrolled in a two-year community college or in a vocational program, and that many college graduates have amassed student loans that could have been minimized or avoided by enrolling in other educational and training programs).


147. A. Michael Spence, Job Market Signaling, 87 Q. J. OF ECON. 355, 364 (1973); see also McCaffery, supra note 131, at 632-33; Gillian Lester, Careers and Contingency, 51 STAN. L. REV. 73, 132 (1998) ("Rational employers who lack information about the prospective productivity of competing job applicants may use easily identified proxies to sort workers according to predicted quality. Such proxies or 'signals' include educational characteristics, physical appearances, and job history.").


149. See Bills, supra note 107, at 445.
In educational screening, degrees [are] . . . used to cut down large pools of applicants, to filter less productive recruits from more productive ones, to eliminate people who lack[ ] particular skills, and to select applicants who ha[ve] demonstrated their ability to learn new tasks (even if the tasks [are] not the specific ones required for the job). 150

Education screens or identifies individuals with preexisting skills and abilities required in particular occupations but does not impart specific skills needed for those occupations. 151 “Screening theory interprets formal education as a mechanism for identifying individuals who are ‘fast learners’ and who can therefore be trained to a higher level, more quickly and at a lower cost.” 152

The difference between the human capital theory and screening/signaling theories is that the human capital theory claims that education adds to productivity, while screening/signaling theories assert that education generally serves to identify the people that are productive. 153 “Thus, the argument goes, it is not that schooling imparts any productivity-enhancing skills, but rather that, in a world of imperfect information, schooling identifies those who are inherently more productive.” 154 An obvious flaw in such a theory is that it ignores the fact that due to systemic racism and sexism and various other political, economic, and sociological factors, many productive people are not able to attend college. 155

154. Id.
155. See, e.g., infra notes 397-403 and accompanying text (discussing the story of four high school students who won a robotic competition—heating out ivy league college students—but who could not afford tuition at a four-year college because as undocumented immigrants, they do not qualify for financial aid). According to census data from 2004, men continue to have a higher proportion of their population with a bachelor's degree or higher (29.4 percent compared with 26.1 percent of women), even though high school graduation rates for women continue to exceed those of men, 85.4 percent and 84.8 percent, respectively. See College Degree Nearly Doubles Annual Earnings, Census Bureau Reports, U.S. CENSUS BUREAU NEWS, Mar. 28, 2005, available at http://www.census.gov/Press-Release/www/releases/archives/education/004214.html.
Control theory makes a Marxist critique of human capital theory's explanation of the relationship between education and job assignment. Under control theory, education serves to inculcate non-cognitive characteristics, such as self-reliance and ambition in elite schools and passivity and docility in non-elite schools, in order to preserve capitalism. Maintaining proletarianized labor, capitalistic employers, rather than workers, "benefit most from the institutional structure of schooling." While higher education pretends to be open to all on the basis of individual intellectual merit, it primarily functions in a way that maintains elitism and serves to perpetuate existing class hierarchies. Therefore, by engaging in credentialism for jobs that do not require a college degree, employers are only further perpetuating the elitist hierarchies that exclude historically disadvantaged groups from the workforce.

While the foregoing labor economic theories may have some empirical support, they do not prove that a substantial correlation exists between acquired credentials and skills necessary for job performance or even that employers and educators are using credentials to exclude historically-disadvantaged groups from positions of power and wealth. One would, however, suspect that credentialism affects the labor market in a manner that is unfair to competent workers who only have a high school diploma and, as explained later, results in an

156. See Bills, supra note 107, at 450 (attributing articulation of control theory to Samuel Bowles and Herbert Gintis, authors of Schooling in Capitalist America).
157. Id.
159. See, e.g., James E. Rosenbaum, Do Employers Really Need More Educated Youth?, 70 Soc. Educ. 68, 80 (1997) (disputing the assertion that employers use credentials arbitrarily and concluding that employers have specific skills that they need, that those skills are related to the work employees will be doing, and that employers go to great length to recruit persons with those skills). A study evaluating the ability of credentials to "signal" to employers that the employee had higher productivity than similarly-situated non-credentialed peers found that employers do not overly use arbitrary credentials to screen employees for entry-level positions and when making promotion decisions. See Hiroshi Ishida et al, Educational Credentials and Promotion Chances in Japanese and American Organizations, 62 Am. Soc. Rev. 866, 880 (1997). In this comparative study of a large employer in the United States and a similarly-sized one in Japan, the author concluded that credentials are mainly useful in the beginning of a person's career, but not as useful as the career advances and as promotion decisions are being made. Id. The study also discovered that college quality and major were important in hiring and somewhat important in promotion decisions in Japan. Id. However, in the United States, an employee's work career was the best predictor for that person's potential to be hired or promoted. Id.
160. See Bills, supra note 107, at 460; Wolff, supra note 137.
unlawful discriminatory impact on groups protected by anti-discrimination laws.

Some employers are filling numerous positions with college degree holders even where a degree was not a prerequisite in the written job description and may be unnecessary to perform the job.\footnote{Arlene Dohm & Ian Wyatt, \textit{College At Work: Outlook And Earnings For College Graduates, 2000-10}, 46 \textit{OCCUPATIONAL OUTLOOK Q.} 2, 4 (2002), available at http://www.bls.gov/opub/oaq/2002/fall/art01.pdf. Labor analysts observed the bias in favor of college graduates when they looked at data about employees in certain supervisory positions: Supervisors considering candidates for promotion may look more favorably upon those who have a college degree than on those who do not have one. For example, in 2000, 24 percent of supervisors in administrative support and clerical occupations had a college degree, even though college graduates are only 14 percent of the workers in this occupational group as a whole. Similarly, 32 percent of supervisory police and detectives in 2000 held a college degree, despite college graduates being 21 percent of non-supervisory police and detectives. Id.} The Department of Labor recognizes the trend among employers to identify jobs as “college-preferred.”\footnote{Labor analysts also state that another factor that makes it difficult to assess the future for college graduate is that employers make it difficult to determine when a college degree is a job requirement. \textit{Id.} at 11. “Few occupations actually require that all workers have a college degree to perform their duties. Instead, many occupations now are categorized as college preferred.” \textit{Id.}} Therefore, this article labels those jobs as “high school jobs” and/or “college-preferred jobs” and distinguishes them from high-level management positions or jobs in specialized areas (e.g., law or medicine) where degrees are considered necessary for competent performance.\footnote{For a discussion about the extent to which college graduates are taking high school jobs, see John Tyler et al, \textit{Are More College Graduates Really Taking ‘High School’ Jobs?}, 118 \textit{MONTHLY LAB. REV.} 18, 27 (1995) (showing that the labor market was able to absorb a 60% increase in college graduates from 1970-1980, even though a small percentage of those graduates were underemployed). \textit{But see} Daniel E. Heckler, \textit{College Graduates in ‘High School’ Jobs: A Commentary}, 118 \textit{MONTHLY LAB. REV.} 28, 28 (1995) (criticizing the above article, noting that the change in census data reporting from 1970-1980 may have skewed the results, and calling for college administrators to provide students seeking degrees more information on earning potential for fields of study).}

As a conspicuous example of the trend among some employers to prefer college graduates over high school graduates, consider the recruitment practices of the United Parcel Service (“UPS”) on college campuses.\footnote{UPS is not being singled out. Many employers are now recruiting on college campuses. \textit{See}, e.g., Randolph Heaster, \textit{Labor Scene Column, KAN. CITY STAR}, Mar. 15, 2005, available at 2005 WLNR 4010176 (identifying the following participants in a two-day job at the Maple Woods Community College: “Argosy Casinos, CitiCards, DST Systems, Harley-Davidson Motor Co., United Parcel Service and several retailers and banks”).} UPS participates in numerous job fairs on many college campuses.\footnote{Until 2004, UPS actually maintained a recruitment office in...} Until 2004, UPS actually maintained a recruitment office in
the student union of Ohio State University, where they hired students for positions such as part-time package handlers. UPS's website advertises these positions as "The Perfect Job for College Students," boasting career advancement, experience in a Fortune-100 company, and opportunity to learn various business skills. These jobs are sought after because they require almost no skills and come with salaries and benefits that surpass many other low-skill jobs. While UPS does not make college education a prerequisite for these positions, UPS is filling many positions with current college students and college graduates. Arguably, UPS recruits at college campuses just because they are an immediate source of workers able to work part-time. Given the fact that a UPS part-time package handler is likely to have a salary and benefits package superior to those available for most low-skill positions, UPS should have no problem finding high school graduates willing to work part-time by advertising through traditional means. These UPS jobs are actually high school jobs for which a college education is neither job-related nor a business necessity. Because UPS and other employers are unnecessarily causing the number of college-preferred positions to increase, where does that leave the high school graduate or dropout?

166. The author regularly used this UPS center and was, therefore, aware of UPS's hiring practices and when it ceased operations. Since that time, the author has seen (as recent as December 2005) an UPS advertisement on a Columbus, Ohio television station seeking college students to apply for package handling positions.


168. Sometimes students consider these jobs so good that they drop out of college to work full time for UPS. See, e.g., Jason Roberson, UPS Employee No Stranger to Change, DAYTON DAILY NEWS, Feb. 25, 2005, at A7, available at 2005 WLNR 2994284 (stating that a student who was one class short of graduating from Sinclair Community College dropped out to take a job at UPS). However, because UPS offers a tuition-reimbursement program, students can still further their college education. See United Parcel Service, supra note 167.

169. See supra notes 164-66 and accompanying text.

170. See, e.g., Craigs List: P/T Work -- Work as a Package Handler at UPS (June 28, 2005), http://www.craigslist.com/nby/etc/81408808.html (last visited on May 27, 2005) (posting an advertisement for a part-time package handling position at UPS in San Rafael and stating the following: "Work in a fast paced environment, loading and unloading packages averaging 35 lbs. Starting wage is $9.85 per hour and $10.35 per hour after 90 days. As a part-time employee you will receive full Medical, Dental, Vision and Prescription benefits and have the opportunity to participate in a 401k and stock purchase plan.").

171. See infra Part III.A (explaining how, under federal anti-discrimination law, employers must meet the "job-relatedness" and "business necessity" standard to justify an employment practice that has a disparate impact on groups protected by the law).

172. See Clifton Coles, Success Without College: Alternative, Nonacademic Futures Abound for Youth, THE FUTURIST, Jan. 1, 2003, at 8. Professor James Rosenbaum recommends the following actions for policy makers to help high school students who are not college-bound to succeed in the workplace:
Employment growth is expected in the lowest-paid job sectors, which typically employ those lacking college degrees. Jobs that do not require a college education will grow by less than 14%. However, the Labor Department predicts that by 2005, the number of jobs requiring a master’s, bachelor’s or associate’s degree will jump by 25%. Jobs requiring an associate’s degree alone will grow by 24%. With the pervasive media coverage on jobs lost to corporate bankruptcies, downsizing, restructuring, and outsourcing, and polls from the 2004 presidential election indicating that the majority of Americans considered job creation and the economy a priority, Americans clearly see higher education as necessary to secure and maintain well-paying jobs. Many will pursue legitimate college degrees, however, one should not be surprised that some consumers will obtain illegitimate ones.

B. Are Competent Employees Who Obtain Bogus Degrees Rational Maximizers?

Economic theory explains the choice of some employees to obtain fake degrees. Human capital and other labor economic theories assume that individuals make rational choices about their human capital investments that are intended to maximize individual earnings in the long run. If an employee lacking a college degree is working competently in a position for which a college degree is not necessary, and if the employee’s boss is denying that employee the type of raise or
promotion that a college graduate could command, the employee would be acting rationally to pay $600 for a bogus degree.\textsuperscript{179} An employee who possesses only a high school diploma would not be a rational self-maximizing actor to quit his position or reduce his work hours to invest $30,000 to get a degree from an accredited four-year university in order to signal competency for a job he is competently performing or believes he can perform if given the chance.\textsuperscript{180}

One response could be that such behavior is unethical.\textsuperscript{181} But, if economic theory can be used to justify employers' unfair treatment of their employees,\textsuperscript{182} then employees' decision to obtain bogus degrees should be viewed as rational and cost-efficient when the employees are competent to perform the jobs at issue.

Employees with bogus degrees perceive themselves to be competent workers,\textsuperscript{183} and others knowingly or unknowingly actually confirm that perception. Bogus degree providers tell consumers they have earned the degrees because they deserve academic credit for their life experiences, including work and other educational experiences.\textsuperscript{184} If

\begin{itemize}
  \item \textsuperscript{179} Based on several thousand respondents' answers to a questionnaire given in his consulting business, John Bear stated that roughly half of the respondents were pursuing a college degree because their employers either required a degree for the position sought or simply rewarded degree holders with pay increases and promotions. EZELL \& BEAR, supra note 3, at 107-08. Because of these responses, Bear concludes that workers have a persuasive reason to pursue a college degree, and for some, "it is a persuasive reason to short-circuit the process by purchasing a degree." \textit{Id.} at 108. Short-circuiting the process may be even more appealing when workers receive spam mail suggesting that they deserve a degree based on their work experience. \textit{See, e.g.}, supra note 184.
  \item \textsuperscript{180} \textit{See infra} notes 219, 402 and accompanying text (discussing student loans and stating tuition at one four-year institution is $15,000 annually). According to census data, this employee would have had to spend an average of $10,660 each year on tuition, room, and board for a traditional 4-year degree from a public college. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2004-2005, \textit{available at} http://www.census.gov/prod/www/statistical-abstract-04.html (2005). A private institution would cost an average of $31,051. \textit{See id.} Presumably, these rates will increase each year. \textit{See infra} note 217.
  \item \textsuperscript{181} EZELL \& BEAR, supra note 3, at 191-200 (discussing the ethics of using fake degrees).
  \item \textsuperscript{182} In the name of economic theory, unethical and unfair business practices have been upheld even though they hurt employees. The author does not condone these business practices. \textit{See generally}, Judith J. Johnson, \textit{Rehabilitate the Age Discrimination in Employment Act: Resuscitate the "Reasonable Factors Other Than Age" Defense and the Disparate Impact Theory}, 55 HASTINGS L.J. 1399, 1401 (2004) ("Do we want a society in which everything is justified by economic efficiency and other human values are ignored?.... Making older workers expendable, even if justified in terms of economic efficiency, cannot be justified in terms of morality or in terms of the cost to society.").
  \item \textsuperscript{183} \textit{See, e.g.}, Bogus Degrees Senate Hearings, supra note 21, at 19.
  \item \textsuperscript{184} \textit{See, e.g.}, EZELL \& BEAR, supra note 3, at 207 (explaining that a Telemarketing script used for selling degrees invites people to consider the degrees they are buying as "documentation of your accomplishments"); \textit{E-mail from "johnson.andrew.c@broadband.att.com," to Creola Johnson, Associate Professor of Law, Ohio State University, Michael E. Moritz College of Law (July 12, 2005).}
\end{itemize}
a 21-year-old college graduate with no relevant work experience "deserved" a well-paying job that a 35-year-old, lower-paid, high-school graduate trained the 21-year-old to do, is it not reasonable to conclude that the 35-year-old with twelve years of relevant work experience "deserves" a sheepskin recognizing college-level achievement and competency? Along with the fake degree provider, the GAO Report arguably has the perverse effect of confirming employee self-perception of competency. The 463 employees exposed by the GAO Report for having unaccredited degrees did not surface because of allegations of incompetency. In fact, only a very small number of employees exposed by the GAO Report and other investigations have been terminated or disciplined.

2006, 16:49 EST) (receiving spam mail stating “CALL US TODAY AND GIVE YOUR WORK EXPERIENCE THE CHANCE TO EARN YOU THE HIGHER COMPENSATION YOU DESERVE!”) (emphasis in original).

185. See supra note 179 (explaining how an employer’s actions may give a worker persuasive reasons for getting a fake degree). See also Dohm & Wyatt, supra note 161, at 4-7 (finding that degrees give college graduates more career options, better promotion opportunities, higher earnings, and lower unemployment, but not discussing the existence of employment practices which screen out those who do not have the “correct” credentials).

186. Laura Callahan was the only high-level employee forced to resign. See Ly, supra note 11. Most employees exposed by the GAO report still have their jobs. See, e.g., Stephan Barr, An Endless Search for Accountability, WASH. POST, May 16, 2004, at C2 (reporting that three managers at National Nuclear Security Administration were not disciplined despite having fake/unaccredited degrees because the “degrees were not preconditions for their employment”); Ly, supra note 11 (quoting Abell as stating “my bosses have been supportive and I appreciate their support”). As for non-GAO investigations, most holders of bogus and unaccredited degrees still hold their positions and a few have faced disciplinary actions other than termination. See, e.g., Johnson, supra note 24, at 412-13 (discussing arbitration dispute lost by two teachers who kept their jobs but were denied pay increases at the graduate level for the doctorate degrees they had obtained from a reputed diploma mill); College Head’s Online Degree Questioned, USA TODAY, Mar. 27, 2004, available at http://www.usatoday.com/news/education/ 2004-03-27-questionable-degrees_.x.htm (stating the president of Gwinnett College of Business in Lilburn, Georgia still holds his position after discovery of his doctorate from St. Regis University, which waived 60 percent of the required course work by giving him academic credit based on prior work experiences.); Allan Taing, Lecturer Has A Diploma Mill Ph.D., ONLINE TEACHING DEGREES, http://www.online-teaching-degree-guys.com/articles/diploma_mill.php (last visited on May 27, 2005) (reporting that a full-time lecturer who was rated very highly on his teaching evaluations at the University of California at Irvine still holds his teaching position despite having a doctorate from a British diploma mill, University of Devonshire, because the doctorate was deemed to not be a necessity for his position); Fox Doctor’s Diploma Mill Degree: “Swan” Therapist Got Ph.D From Unaccredited California Outfit, THE SMOKING GUN, May 14, 2004, http://thesmokinggun.com/archive/0514041swan1.html (last visited July 27, 2005) (stating Lynn lanni, a mental health therapist, hired to give advice to candidates on Fox Television’s reality show “The Swan,” obtained a Ph.D. in Clinical Psychology from unaccredited California Coast University); Marc Schwarz & Laura Fasbach, Reality Bites, REC., May 24, 2004, at F1, available at 2004 WLNR 15189598 (although the show is now off the air, stating that Lynn lanni mostly likely paid $4,000 for doctorate degree because California Coast University charges a flat fee).
An example of a rational employee using education credentials to signal competency to prospective employers is the aforementioned Charles Abell. He was exposed in the GAO Report for attaining a master’s degree in human resource management from an internet diploma mill. In 2002, President Bush appointed Abell as the Principal Deputy Under Secretary of Defense for Personnel and Readiness at the Department of Defense, a senior position which requires Abell to perform high-level, human resource management functions. Prior to this appointment, Abell had worked for a year in the Department of Defense in another high-level human resource management position, and before that, he worked for eight years as a staff member for the Senate Armed Services Committee (“SASC”).

When he began working as a staff member, Abell had only a bachelor’s degree in political science, a degree obtained in 1976 that could not have equipped him with the skills necessary to perform the numerous human resource management functions of either his current or previous position. In response to questions about Abell’s qualifications, the Office of the Secretary of Defense defended Abell’s actions: “In 1998, while working on the [SASC], Abell chose to pursue higher education to expand his knowledge of human resource management. His goal was to find a program that allowed him to study while working and the Columbus University program met his objective.”

The picture seems clear. As a SASC staff member, Abell was stuck in a position that appeared to be going nowhere. Presumably, he had some personnel management experience as a result of his 26-year service in the Army, where he rose to the rank of lieutenant colonel, and his years of staff service on the SASC. But evidently Abell’s service

187. See supra notes 8-15 and accompanying text.
188. Ly, supra note 11. The author does not condone Abell’s actions. See infra Part III.B (discussing ways employers can foster the pursuit of legitimate higher education).
189. See Abell’s Bio, supra note 9.
190. See id. (describing Abell’s job responsibilities).
191. See id. In his position as the Assistant Secretary of Defense for Force Management Policy, Abell was “responsible for the policies, plans and programs for military and civilian personnel management, including recruitment, education, career development, equal opportunity, compensation, recognition, discipline and separation of all Department of Defense personnel.” Id.
193. See id.
194. Id.
195. See Abell’s Bio, supra note 9.
in the Army was insufficient to secure a high-level position in the Department of Defense. By obtaining a master’s degree for an estimated $2,095,196 Abell maintained his current position and income, but also signaled to his superiors and some prominent people in the Bush administration that he was qualified for the positions he ultimately secured. Incredibly, Abell said he believed Columbus was an accredited university simply because an official there told him so. If Abell felt he deserved any of the academic credit Columbus gave him for life experiences, he may have chosen not to question the school’s legitimacy even though Columbus was never accredited and its license to operate was revoked. Although the academic work required by Columbus ought to have created reasonable suspicion about its legitimacy, Abell made the rational decision to obtain a degree from Columbus in order to further his career.

Officials in the Department of Defense, like all employers, are assumed to be rational actors who make decisions that increase or at least maintain productivity. These officials decided that Abell was competently performing his job despite his lack of an accredited degree in the area of expertise relevant to his position. Because Abell and the majority of employees accused of degree fraud have been able to keep their positions, one may reasonably conclude that the employers’ refusal to terminate arises from a rational decision that the employees were performing competently and, therefore, worth retaining. Accordingly, employers need to own up to their over-reliance on educational credentials to screen out so-called “incompetent” employees.

Until now, this article has asserted that credentialism can be unfair and problematic regardless of whether an employer seeks to fill an entry-level position with a baccalaureate-degree holder or a high-level position with a graduate degree holder. For purposes of offering solutions to curb

196. Wait & Dizard, supra note 192.
197. Id.
198. Id. (referring to granting credit for life experience as “credentializing”).
199. See Ly, supra note 11; Wait & Dizard, supra note 192.
200. See Ly, supra note 11. See also Bogus Degrees Senate Hearings, supra note 21, at 39 (stating that, in a survey of 1,100 accredited schools, only 6 percent offered credit for life experience at the master’s degree level).
202. See Wait & Dizard, supra note 192.
203. See infra Part IV (discussing solutions to combat credentialism).
credentialism, this article now focuses on enabling persons with only high school diplomas or sub-baccalaureate degrees to qualify for low-to-moderate-skill positions.

C. Acceptable Credentialism: High School Diplomas or Two-Year Degrees?

Because college degree attainment is not affordable and accessible to all, the author would like to reverse the tide of credentialism and go back to a point in time when a person who possessed only a high school diploma could qualify for numerous entry-level positions, particularly those with career advancement potential. Such a reversal may be difficult to achieve given the employer perception that today’s high school graduates are not sufficiently prepared to join the workforce. While employers maintain workers need more education and training, some sociologists “maintain that the idea of a general skill shortage in the labor market is mistaken, and that in fact many workers are underemployed, that is, they have more schooling than they need to effectively perform their jobs.” Employers, however, believe that even though the majority of high school graduates have basic math and reading skills, many graduates lack “soft” or “employability” skills such as punctuality and the ability to communicate, accept supervision, or work with a team. In the 2000 National Employer Survey (NES), 60 percent of employers rated high school graduates as being somewhat

204. See infra notes 206-08 and accompanying text.
205. See THE SOCIOLOGY OF EDUCATION AND WORK, supra note 134, at 51 (“As evidence, analysts point to a rate of expansion in educational enrollments that is much more rapid than technologically induced growth in the demand for skills,” and “it is well-established that in US and Canadian labor markets that the true shortage is one of good jobs, rather than one of worker skills.”).
206. See, e.g., Jeff Bollier, Student Preparedness Examined, Oshkosh Survey Probes Effectiveness of High Schools, OSHKOSH NW., May 27, 2005, available at 2005 WLNR 8555465. The Oshkosh Chamber of Commerce surveyed 53 members which had contact with 340 current and recently-graduated students from area high schools, and reported that “students need to work on teamwork, dependability, punctuality and attendance.” Id.; Rachel Osterman, Attitudes Count[;] “Soft Skills” Top List of What Area Employers Desire, SACRAMENTO BEE, May 23, 2005, at D1, available at 2005 WLNR 8171097 (“[A]ccording to a recent survey of 145 Sacramento-area companies[,] [e]mployers are looking for workers who possess so-called ‘soft skills,’ those non-technical abilities that include showing up on time, demonstrating a good work ethic and communicating well with co-workers.”); Leon Lazaroff, Workforce Needs Polish, U.S. BUSINESSES DECLARE, CHI. TRIB., Apr. 10, 2005, at C10, available at 2005 WLNR 5609228. In a 2001 survey of the National Association of Manufacturers, employers indicated that “32 percent of job applicants possessed inadequate reading and writing skills [and] 69 percent lacked basic employability skills such as reading with understanding, speaking clearly, actively listening and resolving conflict.” Id.

http://scholarlycommons.law.hofstra.edu/hlelj/vol23/iss2/1
prepared for work, but 23 percent rated high school graduates as being "very poorly prepared or poorly prepared." By contrast, "only 4 percent of employers reported that graduates of two-year colleges were very poorly or poorly prepared" and less than 5 percent of employers rated graduates of four-year colleges and universities as unacceptable or barely acceptable. Such employer perception explains why so many employers use higher education credentials as a proxy for competency.

As America continues its expansion as a knowledge-based and service-oriented economy, the employers' need for higher skilled workers should be balanced against the burden imposed on employees to bear the costs of acquiring the credentials necessary to signal competency. Some employers have attempted to encourage the pursuit of higher education through tuition reimbursement programs. However, even when employers have a formal policy of facilitating higher education, their actual practices may hinder employees' ability to attain it. Fifty-four percent of students work full time and research shows that "the college experience is more difficult, more stressful, and longer for students who work." Sometimes employers are not flexible.

207. The Institute for Research on Higher Education, A Report to Stakeholders: On the Condition and Effectiveness of Postsecondary Education; Part Three: The Employers, CHANGE 23, 29 (2002) [hereinafter Report to Stakeholders] (concluding that America's high schools received a grade from the nation's employers that would be, at best, a "C").

208. Id. at 24, 29. Research indicates that a reliable correlation exists between high school academic performance and college graduation, which means that colleges may have some justification in raising their admission standards. See Lynette Silvestri, The Effect of Attendance on Undergraduate Methods Course Grades, 123 EDUC. 483, 483 (2003). A six-year study that followed 400 students found none of the students with high school GPA's below 2.0 completed a degree, compared to those with a GPA in the range of 3.0 to 3.49 who had a 29.9% completion rate. Id.

209. The lack of preparedness among high school graduates is considered so problematic that the state of New York is among six states to participate in a national pilot program to issue a "work readiness" credential to high school graduates who pass a voluntary test measuring their ability to succeed in entry-level jobs. See Lazaroff, supra note 206.


211. See generally LISA MATUS-GROSSMAN & SUSAN GOODEN, OPENING DOORS: STUDENTS' PERSPECTIVES ON JUGGLING WORK, FAMILY, AND COLLEGE iii (2002) (reporting results of study that relied on information gathered in focus groups at six community colleges and stating that study explored issues relating to retention and institutional and personal access as students seek to balance work, college, and family responsibilities).

in permitting time off from work, which limits an employee’s ability to schedule classes and may lead to less interaction with faculty and classmates. In addition to inflexibility in scheduling, some employers offering tuition reimbursement programs impose constraints which prevent employees from taking advantage of these programs.

Although tuition reimbursement programs are in limited supply, they are welcomed given that postsecondary education, unlike secondary education, is not free in America. The cost of postsecondary education at four-year institutions continues to escalate as university administrators scramble to make up for losses in federal and state funding. Student loans are increasingly becoming insufficient to cover the cost of tuition, books, fees, food, and housing. People are graduating with five- and six-digit student loan figures and must, therefore, sign up for loan

also KNOWLEDGEWORKS FOUNDATION, BUILDING BRIDGES TO OPPORTUNITY AND ECONOMIC GROWTH IN OHIO: THE IMPORTANT ROLE OF THE STATE’S COMMUNITY AND TECHNICAL COLLEGES IN EDUCATING LOW-WAGE WORKER 6 (2004), available at http://www.kwfdn.org/resource_library/resources/oboi_paper.pdf (stating that for many low-wage workers, the cost of tuition and fees, along with living expenses, pose heavy burdens and keep many prospective students from applying or enrolling and stating that school life can be daunting to individuals trying to juggle school, work, and family activities).

213. See MATUS-GROSSMAN & GOODEN, supra note 211. In a study of focus groups at six community colleges nationwide, current, former, and potential students identified employer inflexibility as a recurrent problem. Id. One of the participants described her experience:

I ended up leaving a job... They were not flexible, but [the employer] couldn’t be flexible because she had to have people there when she needed them... You had to be there... No “buts” – if you had a test you had to be there, so I had to leave that job.

Id. at 65.

214. Id. at 29 (stating that “working students reported that working limited their class schedule (46 percent), limited the number of classes they could take (39 percent), limited their choice of classes (33 percent), and prevented access to the library (30 percent)...[and] [e]ighty percent do not participate in college-sponsored extracurricular activities”).

215. Id. at 65, 69 (stating that some students believed the coursework pursued would not qualify for tuition reimbursement). Many programs are available only to full time workers. Id. at 69. Yet, some full time workers with significant family responsibilities cannot maintain a full time work schedule, or try to, but the schedule impedes their chances of being successful in school. Another common condition of tuition reimbursement programs is that the recipients must agree to remain with the employer for a certain period of time after the education is completed. Id. at 69 (stating that some employees did not participate in the programs because they did not want to obligated post-graduation to remain with that employer for a certain number of years).

216. The public continues to bear the costs of producing high school graduates.


218. Id.
repayment terms that are often as long as 15- to 30-year mortgages.\textsuperscript{219} Moreover, four-year institutions, both private and public, continue to increase their standards for admission at the undergraduate and graduate level.\textsuperscript{220} Thus, higher education at four-year institutions is becoming increasingly unaffordable - even if student loans are available - and more inaccessible for high school graduates with mediocre academic records. While workers have grudgingly accepted the fact that employers have made educational credentials a prerequisite to obtaining good jobs, employers should not impose on American workers the burden of obtaining degrees at four-year institutions.

Except for highly-skilled positions (e.g., lawyer, doctor, engineer, and nurse) generally recognized as requiring baccalaureate and advanced degrees from four-year institutions, employers should consider a degree or certificate from reputable community colleges and vocational institutes as acceptable credentials for mid-to-low-skill positions. Because community colleges have open admission standards and their fees are considered low-to-moderately priced,\textsuperscript{221} community college

\textsuperscript{219}. The level of indebtedness depends on a number of factors, including whether the person obtained loans to attend a private or public institution and whether the person borrowed to obtain an advanced degree. See, e.g., Sandy Baum & Marie O'Malley, \textit{College on Credit: How Borrowers Perceive their Education Debt: Results of the 2002 National Student Loan Survey}, NELLIEMAE CORP., Feb.6, 2003, at vi, available at http://www.nelliemae.com/library/nasls_2002.pdf (reporting that students attending law and medical schools had an average accumulated debt from all postsecondary years of study of $91,700 but the average combined debt for all graduate students was only $45,900).

\textsuperscript{220}. See, e.g., \textit{NAT'L CTR. FOR EDUC. STATISTICS, MAKING THE CUT: WHO MEETS HIGHLY SELECTIVE COLLEGE ENTRANCE CRITERIA? 1} (1995), available at http://nces.ed.gov/pubs95/95732.pdf (reporting that roughly six percent of all college-bound high school seniors "met each of five admission criteria that the authors chose as being representative of those considered by highly selective colleges"). Two main effects are being pursued by raising admission standards: having a better prepared student body and increasing the school's reputation. See Cullen F. Goenner & Sean M. Snaith, \textit{Assessing the Effects of Increased Admission Standards}, 80 C. & U. J. 29, 33 (2004) (stating that because of increased admissions standards, a large number of students will no longer qualify for automatic admission to the university); Silvestri, \textit{supra} note 208, at 1.

\textsuperscript{221}. See Horn, \textit{supra} note 217, at xiii. Statisticians demonstrate how community colleges still remain affordable:

Like colleges and universities in the 4-year sector, community colleges saw an increase in the average total tuition for full-time students between 1992-93 and 1999-2000, from about $1,400 to $1,600 after adjusting for inflation.... However, unlike the pattern for 4-year institutions, when federal grants were subtracted from net tuition...no change in tuition could be detected for community colleges. It appears, then, that federal grants increased enough to cover the increase in tuition... for full-time students at community colleges. When all grants were subtracted ... net tuition at community colleges was roughly $900 for both years.

\textit{Id.}
education is the only higher education generally accessible and affordable to all.\textsuperscript{222} Moreover, community colleges not only enable students to develop soft skills, but they impart occupation-specific skills, training, and certifications for hundreds of occupations in various industries, such as information technology, business, and healthcare.\textsuperscript{223} Community colleges now serve multiple credentialing roles that include offering two-year and associate’s degrees, providing academic preparation for students to transfer to four-year institutions, offering training and certifications in applied technology and vocational occupations, and fostering a culture of learning by providing continuing education courses.\textsuperscript{224}

Despite the fact that community colleges are generally accessible and affordable to all and consistently provide occupation-specific programs tailored to meet industry needs, many employers continue to favor graduates of four-year institutions over graduates of community colleges.\textsuperscript{225} One study succinctly describes this bias in the following


\textit{The community college access mission is built on low tuition, convenient location, flexible scheduling, an open-door admissions policy, and programs and services designed to support students who may have various socio-economic and academic barriers inhibiting postsecondary success. If community colleges—or similar institutions—were not available, many of these students would not have an opportunity to attend higher education.}

\textit{Id. Even for specialized degree programs, community colleges seek ways to facilitate wider admissions. See, e.g., Charles T. Muse & Mary S. Teal, Alternative Admission Policies for Adult Learners, 21 COMMUNITY C. REV. 44, 45-46 (1993) (waiving SAT requirements for nursing students older than 25 because Florence-Darlington Technical College wanted to ease admission for prospective students).}

\textsuperscript{223}\textit{AMERICAN ASS’N OF COMMUNITY COLLEGES, NATIONAL PROFILE OF COMMUNITY COLLEGES: TRENDS & STATISTICS 64, Tbl. 3.6 (Kent A. Phillippe ed., 3rd ed. 2000) (noting that between 1996 and 1997, America’s community colleges issued 456,508 two-year degrees, 166,776 certificates for programs greater than two years, and 97,376 certificates for programs up to two years).}


\textsuperscript{225}\textit{In the 1997 National Employer Survey, 55 percent of employers rated community college graduates as adequately prepared for entry-level, front-line, and production jobs, and 41 percent rated the graduates as more than adequately prepared or outstanding. See NAT’L CTR. FOR POSTSECONDARY IMPROVEMENT, TOWARD CLEARER CONNECTIONS: UNDERSTANDING EMPLOYERS’ PERCEPTIONS OF COLLEGE GRADUATES 47-48 (1998), available at http://www.stanford.edu/group/ncpi/documents/pdfs/lnmj98.pdf. On the other hand, 40 percent of employers rated four-year college graduates as adequately prepared and 56 percent of the graduates as outstanding or more than adequately prepared. Id. at 49. In analyzing the reasons for the}
manner: "[a] four-year baccalaureate degree becomes the sought-after credential in the labor market—accepted without reservation, examination, or criticism. The certificates and degrees of two-year institutions, particularly community colleges, are less well-regarded than those granted by four-year institutions."226 Yet research shows that degrees and certificates from two-year institutions "are still considered valuable signals of work preparedness for new hires,"227 and those with such credentials see a return on their investment.228 Enrollment in community colleges almost equals enrollment in undergraduate programs at four-year institutions.229 Consequently, employers have at their disposal a ready pool of job applicants who are pursuing and attaining affordable higher education230 and thereby signaling their competency to perform mid-to-low-skill positions in any workplace. Some employers unfairly continue to favor graduates of four-year institutions over community college graduates, even if this practice does not amount to unlawful discrimination. When it comes to mid-to-low-skill positions, the current culture of credentialism—preferring graduates of four-year colleges—not only appears to maintain elitism and perpetuate existing class hierarchies, but does not help employers identify which workers are the most competent for their workforce.231

226. See Report to Stakeholders, supra note 207, at 37.
227. Id.
228. See, e.g., Diana Crew & William J. Flynn, The New Sheepskin, Community C. J., 9, 10 (2002) (finding in a study of information technology professionals who obtained certifications, "37 percent received a promotion within the first year of attaining their first certification," "53 percent received a salary increase within a year of primary certification attainment," and "74 percent said certification played a major role in their salary increase").
229. Nat'l Ctr. for Educ. Statistics, Findings From the Condition of Education 2002: Nontraditional Undergraduates 6-7 (2002) (demonstrating that the more nontraditional a student is, the more likely they are to choose a public 2-year institution). While 17 percent of traditional students prefer two-year institutions, 64 percent of highly nontraditional (those with four or more nontraditional characteristics) students prefer the same. Id.; Kevin Karey, A Matter of Degrees: Improving Graduation Rates in Four-Year Colleges and Universities 223 (2004), available at http://www2.edtrust.org/NR/rdonlyres/11B4283F-104E-4511-B0CA-1D3023231157/0/highered.pdf.
230. See supra notes 221-224, 227 and accompanying text.
231. See supra notes 128-59, 227 and accompanying text (reviewing research literature about the correlation between higher education and skills).
III. ESTABLISHING A DISPARATE IMPACT DISCRIMINATION CASE

Employment discrimination law supports the conclusion that employers do not have the unfettered discretion to use educational credentials as a screening tool. In *Griggs v. Duke Power Co.*, the Supreme Court of the United States first recognized the disparate impact theory of discrimination, which prohibits employers from engaging in facially-neutral employment practices having a disproportionately harsh effect on a protected class, unless such practices are job-related and consistent with business necessity. In *Griggs*, the Court found that an employer violated Title VII of the Civil Rights Act of 1964 by requiring that employees pass two standardized tests and have earned a high school diploma in order to obtain certain unskilled jobs in a department where such requirements disproportionately excluded African-American employees. The Supreme Court found that a disparate impact existed because at the time of the employer’s policy of hiring only high school graduates, merely 12% of black males in North Carolina had high school diplomas, while 34% of white males were high school graduates. The employer could not show that the diploma requirement was related to successful job performance. The court observed that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”


234. *Griggs*, 401 U.S. at 430 n.6, 433.

235. Id. at 432. Although the challenged requirements may have been “neutral on their face, and even neutral in terms of intent,” the Court reasoned that the employer violated Title VII because “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.” Id.
CREDENTIALISM AND FAKE DEGREES

A. Hypothetical Plaintiff Shows Education Requirement Has Disparate Impact on Hispanics

Since Griggs, Congress has codified the appropriate burdens of proof in a disparate impact case with its passage of the Civil Rights Act of 1991. In the first stage of a disparate impact case, the “complaining party [must] demonstrate [ ] that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin.” To “demonstrate” means to “meet[ ] the burdens of production and persuasion,” which courts interpret to mean the plaintiff must show “that a facially neutral employment practice has a significantly discriminatory impact.”

Demonstrating disparate impact “can be tricky business; it often involves ominous-sounding methods of statistical inquiry like ‘multiple regression analysis’” and “standard deviation.” However, the Supreme Court has stated that a plaintiff in a Title VII suit need not prove disparate impact with scientific certainty; rather the standard of proof is preponderance of the evidence. In short, the plaintiff must show a legally significant disparity between the racial composition of the persons currently employed under the employment practice and the racial composition of the qualified applicant pool. At different times, courts have allowed plaintiffs to rely on national or regional population figures to establish the qualified applicant pool. Courts, however, have held that “evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants,” and, therefore, plaintiffs must rely on data showing the racial composition of

240. See id. (quoting Eastland v. TVA, 704 F.2d 613, 621 (11th Cir. 1983); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988)).
242. See In re Employment Discrimination, 198 F.3d at 1312.
243. Id. at 1312-13 (quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n. 20 (1977) (finding regional and even national population figures to be probative in a discrimination suit)).
244. Id. at 1313 (quoting Int’l Bhd. of Teamsters v. United States, 431 U.S. at 339-40 n.20).
those possessing the qualification required by the employer's challenged employment practice.\textsuperscript{245}

Although there have been no recent cases involving a discriminatory impact challenge to a higher education requirement,\textsuperscript{246} the current employment practice of preferring college graduates over non-graduates is likely to have a discriminatory impact on certain minority groups. To illustrate how a plaintiff could establish a prima facie disparate impact case, consider a hypothetical lawsuit filed by a Hispanic person challenging UPS's practice of hiring college students as part-time package handlers.\textsuperscript{247} The plaintiff could produce data comparing the higher education achievement of Hispanics and non-Hispanic whites with population data about those same groups. Hispanics/Latinos serve as a good example of potential plaintiffs who may sue employers that prefer college students/graduates over high school graduates because, as discussed below, Hispanics most likely can show a legally significant disparate impact caused by such a hiring practice. UPS is selected as the defendant in the present hypothetical because, while many employers have employment practices favoring college students, the author personally observed and found many instances where UPS targets college students for its package handling positions.\textsuperscript{248} As a preliminary matter, a court is likely to rule that UPS's hiring practices can be challenged, even if UPS claims college education is only a "preference," not a "requirement." The distinction between the words "preference" and "requirement" is irrelevant, so long as educational attainment is a factor in UPS's hiring decision.\textsuperscript{249}

\textsuperscript{245} See, e.g., Donnell v. Gen. Motors Corp., 576 F.2d 1292, 1297 (8th Cir. 1978) ("We recognize that the inference arising from the general population statistics alone probably is not enough to establish a prima facie case of racial discrimination with respect to the [defendant's] educational requirements....").


\textsuperscript{247} See supra notes 164-167 and accompanying text (discussing UPS's on-campus recruiting practices, including the actual maintenance of a recruitment office in a university's student union).

\textsuperscript{248} See id.; Michelle Kowalski, Employees Go Back to School - Courtesy of the Boss, ST. CHARLES COUNTY BUS. REC., MO., Oct. 26, 2005, available at 2005 WLNR 16349686. Mike Tabaka, a human resources representative and recruiter at UPS, is quoted as stating that the UPS implemented a recruiting program roughly "seven years ago mainly to recruit part-time employees for package operations" and that "he targets college students or high school seniors who are in a co-op work/school program to work in the package operations." Id.

\textsuperscript{249} See, e.g., EEOC Dec. No. 73-0133, 19 FAIR. EMPL. PRAC. CAS. (BNA) 1765, 1766 T. 15 (1972). After discussing the respondent's preference for hiring janitors with an eighth grade education and filling other jobs with persons having at least a high school education, the Equal Employment Opportunity Commission "note[d] that there is no meaningful distinction between an
Hispanics comprise the largest minority group in the United States. The U.S. Census Bureau estimates that the Hispanic population has grown from 12.3 percent in 2000 to an estimated 14 percent of the nation’s total population in 2004,250 concluding that the 37 million Hispanic residents (born or immigrated in the United States) have replaced African-Americans as the largest US minority group.251 Yet research shows that Hispanics have the lowest education levels of any racial group.252 Of the estimated 41.3 million Hispanics residing in the U.S., 58.4 percent of Hispanics age 25 and older had, at least, a high school education in 2004, while whites made up the highest percentage of individuals with a high school diploma or higher (90.0 percent), followed by Asians (86.8 percent), and African-Americans (80.6 percent).253 By contrast, only 12 percent of Hispanics 25 years and older have obtained a bachelor’s degree or higher as of 2004, while Asians made up the highest percentage, with a bachelor’s degree or higher (49.4 percent), followed by whites (30.6 percent), and African-Americans (17.6 percent).254 Out of the nearly 17 million students enrolled in college in 2003, only 10 percent were Hispanics.255 Furthermore, the higher education achievement gap between Hispanics and whites is growing rather than shrinking because the enrollment rates of whites are increasing at a greater percentage than the enrollment rates for Hispanics.256

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251. See id. (noting that the Hispanic population is an estimated at 41.3 million in the U.S. as of July 1, 2004, thereby making persons of Hispanic origin America’s largest race or ethnic minority).


254. See BERGMAN, supra note 253; U.S. Census Bureau, supra note 250.


Based on the foregoing, a large number (58.4 percent) of Hispanics could qualify for a UPS package handling position if a high school diploma was the highest required level of educational attainment, but only a small number qualify under UPS's current practice. The information about the racial composition of those hired as package handlers by UPS is private and therefore unknown. However, the percentage of Hispanics hired as package handlers is likely to be significantly under-represented in comparison to their representation in the general population. This is particularly likely to be true due to the percentage of Hispanics excluded from the applicant pool because of their lack of higher education. UPS's preference for college students, along with its practice of advertising to college students and recruiting on college campuses, has a deterrent effect on the completion of applications by Hispanics lacking college education. Therefore, any disparate impact a plaintiff can establish will likely make the legal significance of the disparity even greater. Accordingly, Hispanics suing UPS can likely show a disparate impact caused by its hiring practice of preferring college students.

The author recognizes that as a result of recent holdings in disparate impact cases, a Hispanic suing UPS may encounter judicial resistance to a claim of discrimination. Scholars in the field observe that the great majority of employment discrimination suits are based on disparate treatment claims and that in the small number of disparate impact

(finding that Hispanic students are the most likely of any ethnic group to attend large, disadvantaged high schools and noting factors that are associated with lower student achievement and higher dropout rates).

257. See, e.g., Donnell v. Gen. Motors Corp., 576 F.2d 1292, 1298 (8th Cir. 1978) (stating that the employer's "educational requirements will not only cause completed applications to be rejected, but it will also deter the completion of applications").

258. See Melissa Hart, Subjective Decisionmaking and Unconscious Discrimination, 56 ALA. L. REV. 741, 751 (2005). While more Title VII cases are based on intentional discrimination claims, scholars believe such cases are still hard to prove because of judicial reluctance to interpret ambiguous behavior as discriminatory. See, e.g., Catherine J. Lancot, Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases, 61 LA. L. REV. 539, 544-46 (2001) ("[Lower] courts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits."); Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 LA. L. REV. 555, 560-61 (2001) (showing the lower courts' hostility to employment discrimination cases, in particular noting that plaintiffs are "half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims"); Leland Ware, Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 63 (2000) (observing the doubt and reluctance civil rights plaintiffs must face from the bench).
In recent cases that have been filed, plaintiffs have been unsuccessful.\textsuperscript{259} One explanation given for the small number of disparate impact cases is the reluctance among judges to find that the disparate impact shown by the plaintiff was statistically significant or that a facially neutral policy caused the disparate impact.\textsuperscript{260} Consequently, such rulings can make a plaintiff’s burden of proof almost insurmountable and operate to discourage plaintiffs from pursuing such cases.\textsuperscript{261}

\textit{EEOC v. Joe’s Stone Crab, Inc.}, provides a striking example of a court’s unwillingness to find a significant statistical disparity or a causal relationship between a disparate impact shown and an employer’s hiring practices.\textsuperscript{262} Even though zero women had been hired in the relevant period, the United States Court of Appeals for the Eleventh Circuit described this case as the “paradigmatic ‘hard’ case” and noted that it had “labored for many months to reach the right result.”\textsuperscript{263} Defendant Joe’s Stone Crab, Inc., a popular, family-owned seafood restaurant located in Miami Beach, hired its new food servers in October of each year by conducting a “roll call,” which was widely known in the food

\textsuperscript{259} See Hart, \textit{supra} note 258, at 783 (stating that plaintiffs have rarely filed suits alleging discrimination claims based exclusively on disparate impact and providing explanations for the scarcity of disparate impact claims); Elaine W. Shoben, \textit{Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?}, 42 BRANDEIS L.J. 597, 598-600 (2004) (stating that “perhaps [the] most important [ ] reason that disparate impact litigation has been languishing is that its potential is not often appreciated by the practicing bar,” and “identifying] other causes for the relative neglect of the theory, including the absence of compensatory or punitive damages for disparate impact claims, resources problems with class actions, employer elimination of the most easily targeted policies, and restrictions on the theory developing in the circuit courts”); John J. Donohue, III & Peter Siegelman, \textit{The Changing Nature of Employment Discrimination Litigation}, 43 STAN. L. REV. 983, 989, 998 (1991) (finding a marked decline in disparate impact cases based on the authors’ review of data about employment discrimination litigation). \textit{See also} Laura Beth Nielsen & Robert Nelson, \textit{Rights Realized?: An Empirical Analysis of Employment Discrimination Litigation as a Claiming System}, 2005 WIS. L. REV. 603, 665 (2005) (stating that the present judicial system may be effective at policing only the egregious forms of discrimination); Michael Selmi, \textit{Why Are Employment Discrimination Cases So Hard to Win?}, 61 L.A. L. REV. 555, 558 (2001) (stating that only 15 percent of discrimination claims filed with the EEOC result in plaintiffs receiving some relief, that this percentage tends to fall below relief provided for other administrative claimants, and that plaintiffs asserting discrimination claims in federal courts “have long suffered success rates that fall below other civil plaintiffs”).


\textsuperscript{261} See Hart, \textit{supra} note 258, at 783 (“The judicially imposed standards for prevailing in a disparate impact case have become so onerous that plaintiffs may be making the extremely sensible judgment that they will be unable to prevail on these claims.”).

\textsuperscript{262} 220 F.3d 1263 (11th Cir. 2000).

\textsuperscript{263} \textit{Id.} at 1267.
service community and attracted mostly male applicants. The evidence presented against Joe’s revealed that from 1986 to 1990, Joe’s hired 108 male food servers and zero female food servers. Although Joe’s maintained no records during this period, the district court speculated that perhaps 3% of all the applicants were female. From 1991 to 1995, after an EEOC charge was filed and Joe’s changed its hiring process, 22.02% of its server applicants were female and 21.7% of the 88 food servers hired by Joe’s were female.

In addressing the zero hiring data, the district court found that Joe’s had maintained an “Old World” European tradition, in which the highest level of food service is performed by men to create an ambience of “fine dining” for its customers. The district court also found that Joe’s hiring practices led to it having a reputation of hiring only male servers and that this reputation, “was largely responsible for the gender skew in the pool of applicants at the annual roll call.” Having found the percentage (up to 3% in the pre-charge period and 22.02% in the post-charge period) of actual female applicants to be skewed, the court held that alternate data had to be used to determine if Joe’s hiring practices caused a significant statistical disparity. Based on the testimony of several expert witnesses, the district court found the qualified pool of food female servers in the Miami area was 31.9%. Citing case law, the district court favored using the pre-charge data and held that a statistical disparity existed by comparing zero percent hired to 31.9% qualified female servers.

264. 969 F. Supp. 727, 730, 733 (S.D. Fla. 1997). At the roll call, each applicant was interviewed by a maitre d’, who based his hiring decision on the subjective factors of appearance, attitude, articulation, and experience. Id. at 736.
265. Id. at 736.
266. Id. at 734.
267. Id. at 736 (finding reliable the estimate of 31.9%).
268. Id. at 733.
269. Id. at 736.
270. Id. at 735.
271. Id. (finding that the available labor pool was at all relevant times 31.9% female).
272. “Statistics from the post-charge period are usually accorded less weight precisely because a lawsuit may be impending.” Id. (citing as support O’Brien v. Sky Chefs, Inc., 670 F.2d 864, 867 (9th Cir.1982) (“later changes in promotion policies [made after charges were brought] could not erase liability for earlier discrimination”).
273. The court stated:

For the pre-charge analysis from October 1986 to June 1991, Joe’s hired 108 waiters. All were men. . . . [E]ven if the applicant pool had contained only 5% women, let alone the 31.9% estimate that the court has found reliable, mere chance could not explain Joe’s failure to hire a single woman. Joe’s zero female hiring rate leads inexorably to the conclusion that some discriminatory influence is at work—what the case law terms the
On appeal, the Eleventh Circuit reversed the district court's finding of a significant statistical disparity.\(^\text{274}\) Without providing strong reasons for selecting the post-charge data over the pre-charge data, the majority of the court found "Joe's hiring system in the post-charge period did not produce a significant statistical disparity between the actual percentage [22.02\%] of women who applied to Joe's for server positions and the percentage [21.7\%] of women actually hired."\(^\text{275}\) The court noted that "reputation" is not a specific employer act or practice but is "far more amorphous" as "a prevalent or common belief, a general name, the opinion of a number of persons."\(^\text{276}\) Unlike the dissenting opinion and the district court, the majority of the court did not find the testimony of Joe's management and maitre d\(^\text{277}\) as persuasive in providing a logical connection between Joe's hiring practices and Joe's "reputation as a discriminator" against female servers.\(^\text{278}\)

The majority opinion stated that even if the qualified labor pool figure of 31.9\%\(^\text{279}\) was the appropriate figure for establishing a disparate impact, the EEOC failed to show how Joe's word-of-mouth and roll-call practices caused the disparate impact.\(^\text{280}\) Moreover, the court stated that "the mere fact that Joe's hired no women in the pre-charge period is not, alone, sufficient to impose upon Joe's Title VII liability. To hold

\(^{\text{274}}\) 200 F.2d at 1275.
\(^{\text{275}}\) \textit{Id.} at 1275-76.
\(^{\text{276}}\) \textit{Id.} at 1280 ("Reputation has never been used, as far as we can tell, as a facially-neutral employment act or practice for disparate impact purposes.").
\(^{\text{277}}\) \textit{Id.} (quoting several testimonies and noting that the district court focused on one maitre d's testimony that "Joe's had a 'tradition' that food server positions were 'a male server type of job'" and another maitre d's testimony that indicated "fine dining establishments throughout the world have an all male staff").
\(^{\text{278}}\) \textit{Id.} at 1279-80.
\(^{\text{279}}\) The dissenting opinion, citing Eleventh Circuit precedent, stated that the district court correctly found that data from the pre-charge, not the post-charge, period was relevant and that a significant statistical disparity existed by comparing the actual percentage of women hired in the pre-charge period (0\%) with the percentage of the eligible labor pool that was female (31.9\%). \textit{Id.} at 1289. Moreover, based on the expert testimony of several witnesses, the dissenting opinion stated "this 31.9\% figure was substantially less and a conservative percentage given the overall evidence." \textit{Id.} at 1289 n.3. The dissenter went on to say: "The statistical disparity between 0\% and 31.9\% is stark. And, even when this 31.9\% figure is compared to the 21.7\% hiring statistics in the post-charge period, the 'standard deviation' is between 1.96 and 2.07, which is a legally significant disparity under the case law." \textit{Id.}
\(^{\text{280}}\) \textit{Id.} at 1278.
otherwise would be to impose liability upon Joe’s based on ‘bottom line’ reasoning which the Supreme Court has expressly forbade.”

Joe’s Stone Crab is not highlighted here to prove whether or not the majority correctly ruled in light of Supreme Court precedent or the Civil Rights Act of 1991 but is highlighted to address whether it has foreboding implications for plaintiffs in disparate impact cases. Joe’s Stone Crab should not be read broadly to mean that a plaintiff will not be able to prove a significantly relevant statistical disparity even when the applicant pool is likely to have been skewed by the employer’s actions or inactions. The Eleventh Circuit emphasized the district court’s finding that Joe’s management did not have a policy prohibiting the hiring of women and had no formal recruiting practices that kept women from finding out about or applying for the server positions. Unlike Joe’s Stone Crab, the employers discussed in this article engage in practices (e.g., advertising and recruiting on college campuses) expressly designed to recruit college students/graduates. Therefore, even if such an employer can point to the lack of a significant statistical disparity between the number of Hispanic applicants and the number of Hispanics actually hired, a court could nevertheless rely on data about Hispanics possessing college education in the relevant market. In other words, if a court finds that the pool of applicants has been skewed by the employer’s formal practice of recruiting college students/graduates, a court could reasonably find a significant statistical disparity by looking to data about the lack of higher education achievement by Hispanics in the relevant market in comparison to whites. As some scholars contend, Joe’s Stone Crab and cases like it “do[ ] not justify a broad skepticism about whether disparate impact will reach most practices affecting employment.”

281. Id. at 1276.
282. Id. at 1270, 1276-77 (“The evidence presented at trial does not establish that Joe’s management had an express policy of excluding women from food server positions.”).
283. See generally Int’l Bd. of Teamsters, 431 U.S. 324, 365 (1977) (stating that a “consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection”).
B. Hypothetical Defendant Probably Cannot Show Education Credential is Manifestly Related to Job

Once a plaintiff shows that the employment practice of preferring college students/graduates in the hiring process has a disparate impact on a protected class, the burden shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity. Courts have interpreted this standard as requiring the employer to show that the job requirement imposed has a "manifest relationship" to the particular job.

An employer cannot establish a manifest relationship to the particular job if the duties of the position at issue are being performed by employees lacking a college education. In Liberles v. Cook County, plaintiffs, suing for equal pay for equal work, alleged that their employers, welfare agencies, failed to show sufficient business relatedness to their requirement that applicants for caseworker positions have a bachelor's degree. During a two-year freeze on hiring and promotions, the employers required many "case aides" to take on the duties of caseworkers, although case aides' classification and remuneration remained at the lower level. The plaintiffs showed that 91 percent of case aide trainees and 81 percent of case aides were black, while 81 percent of caseworkers were white, and that only 4.17 percent of blacks over age 25 in the employers' county had college degrees, compared to 12.39 percent of whites. The United States Court of Appeals for the Seventh Circuit upheld the district court's granting of summary judgment to the plaintiffs, emphasizing that it was illogical for the employers to contend that the education requirement served a business necessity for higher level jobs, where the jobs were identical in every way, except for compensation.

288. Id. at 431-32 (noting that whites who did not meet the new requirements challenged by black employees were satisfactorily performing the jobs in question).
289. 709 F.2d 1122 (7th Cir. 1983).
290. Id. at 1128.
291. Id.
292. Id. at 1130.
293. Id. at 1131-33 ("[I]t is illogical to maintain that these job requirements justified assigning the three classes of workers the same tasks but paying the predominantly black group less.").
In the previously-described hypothetical lawsuit filed by a Hispanic plaintiff, UPS would have difficulty establishing that college education is manifestly related to the package handling job, as well as to other UPS positions, which are primarily manual labor jobs. UPS has employees who lack college education working as package handlers. Moreover, UPS's webpage entitled "Package Operations" states: "Our part-time package handling jobs are very physical, fast paced jobs that require moving packages typically weighing between twenty-five and thirty-five pounds and may weigh up to seventy pounds." UPS makes no mention, in any way, that a certain level of intellectual or complex thinking is needed for the job. Consequently, a package handling job is an unskilled, manual labor position. Any healthy adult Hispanic, even though he or she is lacking a college education, or even a high school diploma, should be able to perform this job competently.

If UPS's hiring practice is premised on the conclusion that college students are more likely than non-college students/graduates to be in sufficient physical shape to perform the job, that conclusion would fail to meet the job-related standard required in disparate impact cases. According to Griggs, to meet this standard, the employer must show that the requirement measures "the person for the job and not the person in the abstract." UPS can use a physical fitness test, not educational credentials, to determine if a person is able to meet the physical challenges of being a package handler.

294. See Kowalski, supra note 248.
296. Id.
297. 401 U.S. at 424.
298. See generally Harless v. Duck, 619 F.2d 611, 616 (6th Cir. 1980 (explaining while the Toledo Police Department may impose a physical agility test, the court held that the test in question fell short of what is needed to document and thereby justify its use of the "types of exercises chosen or the passing marks for each exercise"). A physical test that disproportionately excludes older workers is not likely to pose a problem for UPS. See, e.g., Hiatt v. Union Pacific R. Co., 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (stating that "an employment practice which disproportionately falls on older individuals, standing alone, should not be said to give rise to an inference or a presumption of unlawful discrimination on the basis of age"). In Thomas v. City of Evanston, 610 F. Supp. 422, 432 (N.D. Ill. 1985), the court reasoned:

Too often tests which on the surface appear objective and scientific turn out to be based on ingrained stereotypes and speculative assumptions about what is 'necessary' to the job. Thus, tests which discriminate against protected groups must be thoroughly documented and validated in order to minimize the risk of unwarranted discrimination against groups which have been traditionally frozen out of the work force.

Id.
A human capital theorist may suggest that despite the potential disparate impact on Hispanics, the job-relatedness/business-necessity standard is satisfied because an educated workforce would be more productive in the long run, thereby allowing employers to promote within and more effectively compete in a global economy. Apparently believing the same, UPS targets college students for package handling positions because these students “can quickly move up within the organization and can have a part-time management position within six months to a year,” and, “after earning a degree, employees can move into full-time management positions.”

A similar argument was rejected in Roman v. Reynolds Metals Co., a case in which 129 Mexican-Americans challenged an employer’s high school education requirement. The company’s personnel director had been informed that from 1965 until 1971 Mexican-Americans were being disqualified for employment at a higher rate than others because of the educational requirement. Census data showed that for the city in which the company was located, the average educational attainment for persons 25 years of age and over was 12.2 years for whites, 8.0 years for African-Americans, and 4.5 years for Mexican-Americans. At the plant itself, 10.2 percent of the Spanish-surnamed or Mexican-American applicants were automatically disqualified by the educational requirement, compared to only 5.1 percent of all other applicants. The company “contended that the policy was related to a justifiable business reason because it upgraded the overall quality of the company’s work force and facilitated advancement and progression within the plant.” Relying on Griggs, the court held that the job-related, “bona fide business necessity” standard is not established “merely to maintain a high quality of personnel or to ease advancement.”

300. See Kowalski, supra note 248.
302. Id. at 48.
303. Id. at 49.
304. Id.
305. Id.
306. Id. at 50.
307. Id. Even if the ability to promote internally allows the employer to cut costs in the long run, cost savings is probably insufficient to show that an education requirement is manifestly job related. See, e.g., Liberles v. Cook County, 709 F.2d 1122, 1133 (7th Cir. 1983) (“The abstract goal of saving taxpayers’ money is not a legally acceptable justification for paying protected minorities

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In summary, *Griggs* and its progeny make clear that employers cannot prefer applicants with college education over non-credentialed applicants on the assumption that the college educated are more productive and will improve the quality of the workforce. 308 By using the term "college-preferred" in advertising and written job descriptions, employers raise doubts that a college degree/education is a business necessity that is substantially related to successful job performance. As long as a significant disparity continues between high school graduation and college graduation rates for whites and non-whites, employers risk being held liable if they cannot establish job-relatedness and business necessity when filling positions with the college educated.

C. Plaintiff can Still Prevail by Showing the Existence of Less-Discriminatory Alternative

Even if an employer makes a sufficient showing that the challenged practice is job related and consistent with a business necessity, the plaintiff can still prevail by showing the existence of an alternative practice that eliminates or reduces the disparate impact but the employer refuses to adopt this alternative. 310 However, the proposed alternative

less money than white workers who perform the same work. . . . [T]he challenged policy must bear a manifest relationship to the employment position at issue. The desire, however laudable, of county and state employers to save money does not bear a manifest relationship to the assignment and compensation of two jobs that are basically identical.). *But see* Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 30-31 (2005) (providing instances in which cost saving may establish a business necessity defense but stating that "a de minimis cost saving should not provide a defense to a disparate impact claim").

308. While a consensus exists that individuals who invest in postsecondary education reap higher returns (i.e., greater earnings) than non-credentialed individuals, a continuing debate exists over whether America explicitly reaps economic benefits from a more educated workforce. See Adriane Williams & Watson Scott Swail, *Is More Better?: The Impact of Postsecondary Education on the Economic and Social Well-Being of American Society*, EDUC. POL'Y INST. 10-11 (May 2005), available at www.educationalpolicy.org/pdf/gates.pdf (discussing individual benefits). One cannot empirically prove specific benefits that the economy receives from a more educated workforce, although more educated people earn more and therefore pay more taxes, and are less likely to depend on welfare, Medicaid, or other government benefits. *Id.* at 15-18.

309. *See supra* notes 252-55 and accompanying text; *MAKING A DIFFERENCE IN COMMUNITIES INC.*, *supra* note 115, at 15 (stating that almost half the South’s Hispanics, and 30 percent of its African-Americans lack a high school diploma but only 12 percent of Hispanics and 13 percent of African-Americans have a bachelor’s degree).

must also serve the employer's legitimate interest in "efficient and trustworthy workmanship." 

In the case of the hypothetical lawsuit against UPS, the Hispanic plaintiff could propose a physical fitness test as an alternative to UPS's practice of preferring college students when hiring package handlers. The proposed physical test should replicate the physical duties required by the job because courts generally reject tests that measure abstract levels of fitness. For example, in Harless v. Duck, the employer's physical ability test required candidates for police patrol officers to perform a number of tasks including 25 sit-ups, 15 push-ups, 25-second obstacle course, and 6-foot standing broad jump. The test, which had a disparate impact on female applicants, was rejected by the court for several reasons including the fact that "the job analysis disclose[d] the need for some physical activity on the job, but [did] not specifically define the amount of physical strength or extent of physical exertion required" and that "there [was] no justification in the record for the types of exercises chosen or the passing marks for each exercise." Accordingly, UPS would need to design a test that includes typical job tasks, such as ability to lift a certain amount of weight, in order to show the test measures an applicant's ability to successfully perform the job.

While the above example makes it appear easy to establish a less discriminatory alternative to employers' hiring and promotion practices, few plaintiffs have ever prevailed by showing the existence of a less discriminatory alternative, even after enactment of the Civil Rights Act

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311. See 29 C.F.R. § 1607.3(B) (2004) ("Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact."). See also Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)) (stating that the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'").

312. See, e.g., Harless v. Duck, 619 F.2d at 611. In Harless, the employer's physical ability test required candidates for police patrol officers to perform a number of tasks including "15 push-ups, 25 sit-ups, 6-foot standing broad jump and 25-second obstacle course." Id. The test, which had a disparate impact on female applicants, was rejected by the court for several reasons including the fact that "the job analysis discloses the need for some physical activity on the job, but does not specifically define the amount of physical strength or extent of physical exertion required" and "there is no justification in the record for the types of exercises chosen or the passing marks for each exercise." Id. at 616.

313. Id. at 612.

314. Id. at 616.
of 1991. Most litigation in this area involves alternative testing proposals. These alternatives typically fail either because they were not shown to be less discriminatory in their effect or because they were not shown to effectively serve the employer’s purpose.

To balance the interests of both the employers and the employees, this article proposes that employers make greater use of testing to assess competency for numerous low-to-moderately skilled positions. The author recognizes that this proposal is problematic for two reasons. First, some employers continue to oppose testing because at the height of its popularity, many courts found employers could not establish a business necessity defense for tests that disproportionately excluded minorities and women from jobs historically held by whites and/or white males only. Second, many employers fear Title VII lawsuits challenging their tests and worry that formally validating the tests to successfully defend against such lawsuits will be time-consuming and very costly. As explained below, skills testing for numerous jobs is now available and many authors/publishers of skill tests strive to validate their tests as reliable measures of job performance that do not produce an unlawfully discriminatory result.

In 1963, prior to the enactment of Title VII and the Griggs decision, the use of testing had reached an all-time high. In Griggs, the employer required, in addition to possessing a high school diploma, that workers had to achieve a minimum score on two standardized tests in order to be promoted to certain positions. The two tests purportedly measured intelligence and mechanical aptitude but did not directly or indirectly test an applicant’s ability to perform a particular job or category of jobs. Yet white employees who had neither completed high school nor taken the tests were performing satisfactorily in jobs for which blacks were rendered ineligible due to the new job requirements. Rejecting the employer’s use of the tests, the Supreme Court upheld the guidelines issued by the Equal Employment

316. Id.
317. Id.
318. See Lex K. Larson, 3 Lab. & Emp. Law § 61.01 (2005) [hereinafter Larson’s Labor & Employment] (stating that the largest implantation of testing appears to have occurred in the several years preceding the enactment of Title VII and that use of personnel tests grew from being used by 64% of businesses in 1958 to 84% in 1963).
320. Id.
321. Id. at 431-32.
Opportunity Commission (EEOC), permitting the use of tests that are job-related only:

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract. 322

In the years immediately following Griggs, lawsuits challenging employer testing increased and in the large majority of those suits, courts ruled that the tests in question were not job related. 323 In the ensuing decades, employers have learned from their defeats and improved the design and validation of their tests. 324 Consequently, courts uphold tests more often, 325 and employers’ usage of such tests in hiring and promotion decisions is also on the rise. 326

A test may be “validated,” or shown to be sufficiently job-related to comply with the requirements of Title VII. A validation study is required only if the test has been shown to have an adverse impact. 327 However, attorneys specializing in employment law recommend that employers consider obtaining a validation study of any and all employment tests they use. 328 The three recognized validation studies are content validation, criterion-related validation, and construct validation. 329

322. Id. at 433-36.
323. See Larson’s Labor & Employment, supra note 318, at § 61.01.
324. Id.
325. Id.
326. See Bradley S. Paskievitch & David B. Kahng, When the Employment Class Action Comes Knocking: Avoiding One if Possible, and Reducing Risks Once Suit Is Threatened or Filed, No. 23, ASS’N OF CORP. COUNS. DOCKET 69 (Feb. 2005), available at 23 No. 2 ACC Docket 69 (Westlaw); Daniel R. Fisher & Robert J. Nobile, Employee Selection: Best Practices for Reducing Legal Risk in Pre-Hire Assessments, 9 No. 6 HR ADVISOR: LEGAL AND PRAC. GUIDANCE 43 (2005) (stating that the American Management Association reported 60 percent of Fortune 500 companies use testing in their hiring process).
328. See Paskievitch & Kahng, supra note 326, at 72; Fisher & Nobile, supra note 326 (recommending, among other things, that employers obtain opinion letters from the publishers of tests that demonstrate the validity of the tests).
A content validation study ensures that the test comprises and measures substantially all of the knowledge, skills, or abilities that will be actually be utilized during the course of the job, such as when a typing examination is administered to a candidate applying for a word processing position. A satisfactory performance on a typing test that measures speed and accuracy is correlated with successful performance as a typist.\(^{330}\)

In a criterion-related validation, the testing expert compares performance on the test to performance on the job to determine the test’s reliability. The goal of criterion validation is to empirically demonstrate that the selection procedure is predictive of job performance. In an overly-simplified example of a test administered for a typing position, the testing expert, after studying the duties of typist, might decide that finger dexterity is essential to the ability to type well.\(^{331}\) The expert would then use a dexterity test to determine which applicant would be a satisfactory typist.\(^{332}\) To evaluate the validity of the dexterity test, the expert would conduct a statistical study to assess whether dexterous fingers can predict which individuals are good typists.\(^{333}\) As may be evident by this example, criterion validation studies can be very costly and may require a long time to complete.\(^{334}\)

Construct validation studies measure the degree to which a job applicant possesses identifiable characteristics (i.e. constructs) which have been determined to be important in successful job performance.\(^{335}\) This study is the most complex of all the validation studies. It is particularly difficult to test for the constructs (general traits such as intelligence or the ability of a typist to withstand boredom) that are necessary for successful job performance and to ensure that the test accurately measures those constructs.\(^{336}\)

The foregoing general discussion on validation studies leads to a more specific point: employers do not have to rule out testing as a means of assessing competency simply because construct and criterion validation studies may be expensive and time-consuming means of ensuring that a test is legally defensible under Title VII. Given today’s technologies, a content-valid skills test could be useful either in


\(^{331}\) See Swan, supra note 329, at 556 n.12.

\(^{332}\) Id.

\(^{333}\) Id.

\(^{334}\) Id.

\(^{335}\) Id.

\(^{336}\) Id.
identifying a small percentage of stellar candidates or in excluding poorly qualified candidates. For example, Windows-based computer programs exist that simulate an office setting and, for entry-level clerical/office positions, can record an applicant's score on an automated test covering keyboarding, alphabetic filing, proofreading, and word-processing.\textsuperscript{337}

To avoid the cost and time of performing validation studies, employers can rely on content validation studies done by the authors, distributors, or publishers of tests, provided that their studies actually measure job performance and are shown to have no disparate impact on groups protected by Title VII.\textsuperscript{338} However, the EEOC's guidelines caution against relying on validation studies done by these third parties that are based on "offhand reports" and "promotional statements."\textsuperscript{339} Employers should obtain opinion letters from the test's publisher "concerning the test's lawfulness under employment discrimination laws" and should ask for evidence or documentation showing the "precise traits the test seeks to measure and objective proof that the test at issue actually measures these traits."\textsuperscript{340} Also, because of a growing number of cases where tests have been found to be invalid, employers should take caution in relying on third-party studies.

\textsuperscript{337} See, e.g., Adam Agard, Using Objectivity, SUPERVISION, May 1, 2005, at 12 (stating that pre-employment tests now allow employers to automatically screen applicants for abilities and skills prior to interviewing). To save numerous hours interviewing applicants and to avoid the possibility of hiring a person who cannot actually perform the job, one expert recommends using the following job screening process:

A job announcement is created for a new, or recently vacant, position. Applicants send resumes for the position. HR staffers review resumes. Jr. level staffers schedule testing for the "seemingly" qualified applicants. Testing is administered via computer and applicants go home. HR staffers review test results and schedule only the most highly skilled for interviews. HR staffers interview highly skilled applicants and make a selection.

\textsuperscript{338} See LARSON'S LABOR & EMPLOYMENT, supra note 318, at § 61.01; Fisher & Nobile, supra note 326, at 45-47 (explaining the complexities of doing a content validation study). See, e.g., Nash v. Consol. City of Jacksonville, 895 F. Supp. 1536 (1995) (explaining the content validation of an exam used by city for the promotion of fire fighters from lieutenants to captains and upholding the validation which was done by the city's industrial psychologist who conducted job task analysis in conformity with EEOC guidelines, and who proved that the knowledge, skills, and abilities covered in the exam were those required for the captain position).

\textsuperscript{339} See LARSON'S LABOR & EMPLOYMENT, supra note 318, at § 61.01.

\textsuperscript{340} Fisher & Nobile, supra note 326, at 47. See Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 822-23 (M.D. Ala. 1989), aff'd, 935 F.2d 1240 (11th Cir. 1991) (holding that a teacher's test failed to measure job performance). Although recognizing the importance of reviewing test validity with "caution" and "deference," the court nonetheless found that the development of the Alabama Initial Teacher Certification Test was "outside the realm of professionalism," due to numerous "errors" by the test development firm hired to develop the test for the job. Id. at 821; LARSON'S LABOR & EMPLOYMENT, supra note 318, at § 27.06 (summarizing the following serious errors found by the court: "(1) the survey instrument designed to determine
number of specialized head hunters and employment agencies offering testing services, employers could rely on them to test the competency of applicants, particularly when the cost of such tests is reasonable.\textsuperscript{341}

The No Child Left Behind Act represents an example of Congress permitting testing as way for employees to show their competency and thereby keep their jobs, and, without even mentioning Title VII, instructs employers to implement testing that is manifestly related to job performance. Under the Act, paraprofessionals or teachers’ aides hired before January 8, 2002, to assist in Title I schools,\textsuperscript{342} had until 2006 to obtain an associate’s degree, complete two years of college, or to meet a rigorous standard of quality through a formal state or local assessment.\textsuperscript{343} For aides to meet “a rigorous standard of quality,” they whether test objectives were job related was distorted in favor of finding relatedness; (2) a number of items on the examination were changed by the developers without consulting with educators, and a number of changes recommended by educators were ignored by the developers, even though committees of educators were supposed to be involved in reviewing the test items as they were developed; (3) the educators were never actually asked whether the final test items were job related; and (4) a number of items appeared on the examination, even after the educators had rated them as content invalid”).

341. Similar options should be made available in all hiring situations. Companies like Davidson Staffing offer resources that can be modified to meet certain criteria. See Davidson Staffing, http://www.davidsonstaffing.com (last visited July 28, 2005). Davidson recommends that the number of applicants be restricted to six, before being sent to the testing center. See Davidson Staffing, Job Testing and Training, http://www.davidsonstaffing.com/ testing-training.htm (last visited July 28, 2005). Skills such as computer, litigation knowledge, and proofreading ability can be evaluated. \textit{Id}. Reviewing actual skills ensures the best employee match and is not as cost-prohibitive as assumed. Employers could narrow their pool of applicants based on experience and education and then send a small number of applicants to a third party agency. See, e.g., \textit{E-HR New ATS Technology Helps Screen Large Volumes of Resumes}, HUM. RESOURCE DEP’T MGMT. REP., Feb. 2003, at 1 (discussing how HR managers can deal with the voluminous resumes arising from a job announcement by using new web-based technology to sort and weigh the qualifications of candidates and test essential skills); Agard, \textit{supra} note 337, at 12. Thus, experts believe that using automated testing actually saves an employer time, as opposed to the traditional method of relying on reviews of resumes to decide who is “seemingly qualified” and deserving of an interview.


343. See Wayne Riddle, \textit{Education for the Disadvantaged: Overview of the ESEA Title I-A Amendments Under the No Child Left Behind Act}, CONG. RES. SERVICE 22 (Feb. 9, 2004), available at http://Hutchison senate.gov/RL31487.pdf. See also No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (stating that aides must have either: “(a) completed at least two years of higher education; or (b) earned an associate’s (or higher) degree; or (c) met a ‘rigorous standard of quality,’ and ‘can demonstrate, though a formal State or local assessment...knowledge of, and the ability to assist in instructing, reading, writing, and mathematics’ or readiness to learn these subjects, as appropriate”). Paraprofessionals hired after January 8, 2002, must meet these new standards at the time of hiring. \textit{Id}.
could obtain a college education or pass a test that measures "academic assessment, knowledge of, and the ability to assist in the instruction of reading, writing, and math." The testing option gives a means by which the aide can retain his or her job without returning to school.

In addition to a test, some school districts have been more flexible in using other options to measure an aide's competency. For instance, the Fort Worth Independent School District has created a four-day training program which enables aides to acquire the skills an inexperienced aide might be lacking. Similarly, many districts are supporting programs that give a "helping hand" to aides. For example, in Havenhill, Massachusetts, teacher's aides can enroll in a certificate program at two community colleges, where aides complete six courses intended to fill any possible gaps in an aide's knowledge so that he or she can pass the standardized exam. Because the district has chosen to equip aides with the necessary academic knowledge, the course work ensures that aides are prepared to pass an exam that evaluates skills. Without testing, training classes, or some combination of both, aides hired before 2002 and lacking the requisite college education would have the doors of opportunity shut on them, thereby eliminating the prospects of advancement and salary increases. The No Child Left Behind Act's allowance of testing and other options to measure skills recognizes that aides have experience, making them qualified employees worthy of retaining. Therefore, the Act strikes a proper balance between an employer's ability to increase its number of high-quality employees

344. See Riddle, supranaote 343, at 35-36.
345. Some schools have insisted on testing as the only way to measure the competency of aides lacking college education credentials. See Cynthia Garza, Rules Eased for Teacher's Aides, FORT WORTH STAR TELEGRAM, June 10, 2004, at 11B (stating that Hurst-Euless-Bedford schools requires a degree, two years of college or an assessment exam for all instructional paraprofessionals, not only those in Title I schools). The Educational Testing Service has developed the ParaPro test which, if adopted, will certify that previously hired aides are capable. See Educational Testing Service, ParaPro Assessment, http://www.ets.org/parapro/index.html (last visited July 27, 2005).
346. Garza, supranaote 345 (stating the superintendent for instruction has interpreted the law as not requiring "a paper-and-pencil test," but allowing assessment in the form of training). Furthermore, Fort Worth has developed a comprehensive means of evaluating all aspects of an aide's competency by considering an aide's experience, course work, and other factors. Id. See also U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: TITLE I PARAPROFESSIONALS: NON-REGULATORY GUIDANCE 9 (2004).
348. Id. Some districts fear that once the aides have begun an academic program, they will choose to leave, rather than returning to their low-paying positions. Id. See also Garza, supranaote 345 (stating the starting salary for a teacher's aide is $11,000).
349. Buote, supranaote 347.
and adopting an employment practice that allows non-college degree holders to demonstrate their competency.

Unfortunately for employees not covered by the Act, private employers have changed the hiring game by preferring college graduates in filling numerous jobs. Too often these employers avoid using tests or other measures to assess competency. Therefore, some workers will, out of desperation for jobs and raises, obtain fake degrees.

IV. EMPLOYERS CAN PLAY A POSITIVE ROLE IN ADDRESSING THE FAKE DEGREE PROBLEM

Because of credentialism, this article posits that employers are partially responsible for the employee demand for fake degrees. But instead of focusing on whether firing, suing, or incarcerating employees with fake degrees is necessary, this article focuses on ways for private and public employers to play a positive role in reducing the demand for such degrees. Employers should use more effective methods to identify which employees lacking a college education are nonetheless productive, competent workers. Moreover, because degrees do not prove that college graduates have attained certain skills, and because job predictions show that service related-jobs will continue to grow, what the labor market needs is more trained, not necessarily more highly-educated persons. Consequently, as explained below, employers should change their hiring practices to assess the skills of job applicants, not simply rely on education credentials. Furthermore, improvements in the federal work-study program and other tax incentive programs can create on-the-job training for employees to develop certain skills, while providing ways for employees to obtain legitimate education credentials.

350. See generally Johnson, supra note 24, at 485-89 (proposing discipline of employees with fake degrees to deter demand for them).
351. See supra notes 325-41 and accompanying text.
352. See supra notes 128-59, 227 and accompanying text (discussing several economic theories that do not prove a substantial correlation between higher education attainment and successful job performance) and notes 164-66 and accompanying text (discussing predictions for job growth in service industries). See also Starobin, supra note 113, at 2544 (identifying several famous individuals who did not get a degree but were nevertheless very successful).
353. See infra Part IV.A.
354. See infra Part IV.B.
CREDENDTIALISM AND FAKE DEGREES

A. Employers Can Curb Demand for Substandard Degrees by Changing Their Hiring and Promotion Practices

Rather than relying on education credentials alone, employers in most industries should afford applicants more opportunities to demonstrate their skills, as well as their credentials. As previously discussed, employers can rely upon reputable validated skills tests to help select the best employees for many low-to-moderate-skill positions. Employers could be more accepting of certification credentials. For example, Virginia and three other states issue Career Readiness Certificates, and several other states, participating in a national pilot program, issue Work Readiness Credentials to persons with a high school diploma (or general educational development certificate) who pass a voluntary test measuring their ability to succeed in entry-level jobs. The test for the Career Readiness Certificate covers basic skills, such as reading and the ability to apply mathematics, and the certificates come in bronze, silver, and gold. Based on input from employers, the Work Readiness Credential test, administered via computer, covers soft skills in ten broad areas, such as communication skills, interpersonal skills (e.g., ability to follow directions), and negotiating/decision-making skills. Several state and national organizations are working together to make these credentials portable.

355. See supra notes 325-41 and accompanying text.
357. See Lazaroff, supra note 206 (stating that New York is among six states participating in the national pilot program); Jonathan Epstein, UB Center to Teach Basic Job Skills, BUFF. NEWS, Feb. 28, 2005, at B10, available at 2005 WLNR 3150283. The University at Buffalo’s Educational Opportunity Center is one of two New York state test sites for the National Work Readiness Credential program to test job applicants’ ability to perform skills deemed necessary in any workplace. Id. (stating that important skills “include timeliness, teamwork, an ability to follow directions, use of appropriate language, and an understanding of how a workplace is structured”).
358. Benbow, supra note 356 (“Bronze certificate holders possess the skills to perform 30 percent of the jobs profiled by WorkKeys. Silver certificate holders can perform 60 percent and those at the gold level can do 85 percent of the jobs.”).
and valid nationwide so that employers can rely on them when hiring people lacking a college education.\(^{360}\)

Although proposing that employers not rely on higher education credentials to fill low-to-moderately skilled jobs, the author concedes that employers will still have to employ only college-educated individuals for numerous positions (e.g., nurses, teachers, and engineers). When employers reasonably deem postsecondary education as necessary for certain jobs, employers can enter into partnerships with community colleges to groom and find competent employees to fill these jobs. Such partnerships would be beneficial to all because they would allow community colleges to provide customized degrees needed in various industries, allow students to graduate as attractive candidates for employment, and allow employers to hire graduates possessing the skills needed for numerous jobs.\(^{361}\) Some employers and community colleges have general and formal school-to-work programs.\(^{362}\)

The partnership between LaGuardia Community College and the Queens Network of New York City Health and Hospitals Corporation ("NYCHHC") is an example of a successful program providing training for workers in the various medical positions, including licensed practical

\(^{360}\) See, e.g., U.S. Chamber of Commerce, http://www.uschamber.com/cwp/strategies/workreadinesscredential.htm (last visited Jan. 25, 2006). Its website states the following: The Center for Workforce Preparation has become involved with the Equipped for the Future Work Readiness Credential, a portable and nationally-valid assessment scheduled for release in June 2006. This credential is being developed by 5 states (FL, NJ, NY, RI, WA) and the District of Columbia. Initiated in response to business concern about the difficulty in finding qualified applicants for entry-level work, the WRC is based on a cross-industry standard, defined by experts from multiple business sectors, of what entry-level workers need to be able to do to be fully competent. Id.

\(^{361}\) KNOWLEDGEWORKS FOUNDATION, supra note 212, at 9 (stating that the closer the relationship is between employers and community colleges, the more the degree program will meet the employers' needs). While a work-readiness credential is a good idea in principal, it potentially has a number of pitfalls. Steve Goll, Pitfalls of a Work-Readiness Credential, Steve Goll Consulting, May 26, 2004, at 1, available at http://www.stevegoll.com/articles/articles/125.html (identifying a number of pitfalls). Because having a high school diploma or a G.E.D. is not mandatory to take the work-readiness test, the work-readiness credential program could have the unintended effect of discouraging completion of high school. Id. at 1 (stating also that the work-readiness credential will only be valid to the extent that workers with the credential actually perform in accordance with workplace standards).

\(^{362}\) See NAT'L CTR. FOR POSTSECONDARY IMPROVEMENT, supra note 225, at 48. As a part of the 1997 National Employer Survey (NES), conducted by the U.S. Bureau of the Census, employers were asked about their involvement in joint activity between schools and employers “to build connections between school-based and work-based learning.... One in four establishments reported participating in formal school-to-work partnerships; one in three reported engaging in some form or work-based learning, including activities such as job shadowing, mentoring, internships, and cooperative education.” Id.
nurses. Under the program, LaGuardia admits entry-level workers from NYCHHC and individual applicants who were not initially able to enter the college directly. While attending these customized courses, NYCHHC workers are paid their full salary with medical benefits and can also participate in a tuition reimbursement program. The employees, after an intensive one-year nursing program, are able to take the New York State licensure examination to become certified as licensed practical nurses. In recognizing the labor market realities of serving an aging population in need of medical care, the LaGuardia-NYCHHC partnership offers a win-win solution. NYCHHC’s current workers, along with any prospective students, can become certified after only one year of study, thereby saving themselves time and money. The college is able to further its academic mission work and impart soft-skills, as well as occupation-specific ones. Finally, the employer is able to train current employees and hire new workers to fill a growing service industry.

When considering hiring or promoting anyone with postsecondary education, employers should adopt thorough credential-checking policies to deflate the claims of fake and unaccredited schools. These schools claim that their “graduates” have received tuition reimbursement funds and have obtained jobs, raises, and promotions both in the public and private sectors. Recent investigations confirm their claims.

364. Id.
365. Id.
366. Id. The students will earn 48 credits, and if students then wish to earn an advanced degree, they can transfer at least 26 credits toward an associate degree in nursing. See id.
367. A few other large employers are offering college-level training, either on their own, or in partnerships with community colleges. See Hamm, supra note 212, at 32 (“Motorola University” has “400 full-time faculty and 800 part-time specialists at 99 sites in more than 20 countries, serving 100,000 students a year,” and Walt Disney World and Ford Motor Corporation have thriving educational partnerships with community colleges.). Along with these partnerships, employers could involve community-based organizations to facilitate the training of workers qualified to fill positions needed by employers. See, e.g., David Gruber, Building Community College/CBO Partnerships, WORKFORCE STRATEGY CTR. 1, 12 (2005), available at http://www.workforcestrategy.org/publications/WSC_Report_9_15.pdf. Community-based organizations have partnered up with community colleges to offer degrees and certifications as a part of the organizations’ mission to rehabilitate unemployed and low-income residents of the community. Id.
368. See, e.g., David Slade, Jim Thorpe Educators’ Degrees Questioned, ALLENTOWN MORNING CALL, June 14, 2004, at A1 (confirming, through the U.S. Senate Committee on
These investigative findings mean that employers are not doing enough to verify the credentials presented by job applicants or current employees. The GAO identified three reasons why it could not accurately assess the "true" number of government employees who have bogus or unaccredited degrees. First, diploma mills sell bogus degrees very similar in name to legitimate traditional institutions. Second, personnel files sometimes contain incomplete or misspelled names of the universities and no locations or addresses are listed. Third, federal agencies do not follow a uniform and thorough verification process, which would consistently uncover bogus or unaccredited degrees.

Because of the extent of resume and degree fraud, employers should confirm the legitimacy of credentials represented by every job applicant or employee, particularly if the employer prefers graduates of accredited universities. Resume representations could be embellished or outright lies. To ferret out applicants with counterfeit degrees, employers should always confer with university registrars to

Governmental Affairs investigation, Kennedy-Western University's claim that federal agencies have paid for their employees' degrees obtained from Kennedy-Western).

369. See Byron, supra note 16 (reporting dozens of corporate executives with degrees from diploma mills); GAO REPORT No. 2, supra note 8, at 2 (reporting that 463 federal employees have degrees from diploma mills and unaccredited schools).

370. See GAO REPORT No. 2, supra note 8, at 6-7.

371. Id. at 5 (noting that this allows the diploma mills to be mistaken for accredited schools). An example of this is the unaccredited Hamilton University of Evanston, Wyoming, which bears a name similar to fully-accredited Hamilton College in Clinton, New York. Id.

372. Id. Thus, an entry of "Hamilton" will not be sufficient to differentiate between the accredited Hamilton College and the unaccredited Hamilton University. Id.

373. Id.

374. See Diane E. Lewis, Eyes Trained on Employee's Past More Hiring Specialists Say Recent Misdeeds Escalate Need for Checks, BOSTON GLOBE, Mar. 7, 2004, at G1. See also SOC. FOR HUM. RESOURCE MGT., REFERENCE AND BACKGROUND CHECKING SURVEY REPORT 2 (2005), available at http://www.shrm.org/ema/library_published/ID/CMS_011165.pdf (discussing a study which revealed only 82% percent of human resource professionals say their companies routinely check job candidates' backgrounds, but of those who conduct these checks, 70% find reference checking effective in identifying poor performers).

375. Research shows that while there is growing employer acceptance of online degree programs, the majority of employers still place a higher value on traditional degrees than non-traditional online degrees. See, e.g., Maureen Wynkoop, Hiring Preferences in Libraries: Perceptions of MLS Graduates With Online Degrees, http://www.camden.lib.nj.us/survey/results.htm (last visited July 28, 2005) (finding that the majority of the respondents indicated a preference in hiring candidates with traditional masters degrees in library science and finding that employer reluctance to hire applicants with online degrees centered on a concern with the lack of face-to-face interactions and interpersonal relationships in an online degree program).

ensure anyone claiming a degree from a real institution actually obtained it.\textsuperscript{377} Accurate credential checking is now more feasible because employers can consult various governmental websites to determine whether a school is accredited.\textsuperscript{378} By consulting these websites and following effective testing procedures, employers can weed out persons with substandard degrees and select the most qualified candidates.\textsuperscript{379}

\textbf{B. Proposal to Change the Federal Work-Study Program and Offer Tax Incentives to Promote Attainment of Legitimate Degrees}

Because some employers may complain that the costs of assessing the skills of high school graduates and training them to perform certain jobs would be prohibitive, this article also proposes a modification to the federal work-study program in order to subsidize these costs. If the work-study program can be changed to allow high school students to participate, it can provide a pathway for high school graduates to earn accredited degrees.

The current federal work-study program subsidizes part-time employment for low-income undergraduate and graduate students to help meet educational expenses and encourage students receiving program assistance to participate in community service activities.\textsuperscript{380}

\textsuperscript{377} See EZELL & BEAR, supra note 3, at 176-77.

\textsuperscript{378} See U.S. Dep’t of Education, Postsecondary Educational Institutions and Programs Accredited by Accrediting Agencies and State Approval Agencies Recognized by the U.S. Secretary of Education, http://www.ope.ed.gov/accreditation (last visited July 28, 2005) (providing a web page where the public can search a school’s name and see if it is accredited by an ED-recognized accrediting agency); Michigan’s List of Non-Accredited Colleges/Universities, supra note 18 (providing a list of unaccredited schools in Michigan); Johnson, supra note 24, at 482-85 (proposing mass media awareness campaign and citing statutes that require publication of the names of all known diploma mills and substandard schools).

\textsuperscript{379} One recruitment specialist states that an employer wastes roughly $15,000 in training fees, recruiting costs, and money spent replacing and training the dismissed worker when it hires the wrong person for a low-level position. See Lewis, supra note 374.

\textsuperscript{380} See Higher Education Act of 1965, Title IV, Part C (codified as amended in 42 U.S.C. §§ 2751-2756a (2002)). The purpose of the program “is to stimulate and promote the part-time employment of students who are enrolled as undergraduate, graduate, or professional students and who are in need of earnings . . . and to encourage students receiving Federal student financial assistance to participate in community service activities that will benefit the Nation and engender in the students a sense of social responsibility and commitment to the community.” See 42 U.S.C. § 2751(a) (2002). Since most qualified workers are the financially needy, a disproportionate burden of the community services will fall on low-income students. Abbey Marzick, Earn, Learn...Serve?: \textit{Federal Work-Study Program Confronts Midlife Crises as it Nears 40}, 18 \textit{CONNECTION: J. OF NEW ENG. BOARD OF EDUC.} 15, 17 (2003). The people in need of help will only be served by others in the same situation, and wealthier students will still not be encouraged to be active in the community. \textit{Id.}
Under this program, if the student works for the higher education institution or in the public interest for a public agency or private nonprofit organization, then up to 75% of a student’s hourly compensation may be supplied.\textsuperscript{381} If the student works for a profit-making organization, however, the federal government’s share does not exceed 50\%.\textsuperscript{382} Under the federal program, the typical amount awarded to students as work-study is between $650 and $2,000.\textsuperscript{383}

Students working for profit-making businesses are supposed to be provided “jobs under the work study program [that] will be academically relevant, to the maximum extent practicable.”\textsuperscript{384} In a 2000 national study of the federal work-study program, over 60% of students held jobs that did not “complement his or her academic program or career interests.”\textsuperscript{385} Forty-two percent of the students who offered suggestions to improve the work-study program indicated that they wanted more jobs related to their career goals and academic studies.\textsuperscript{386} These complaints imply that too many students are doing janitorial and clerical jobs, thereby

\textsuperscript{381} See 42 U.S.C. §§ 2753(b)(5)(A)(i)-(3) (2001) (stating that the Federal share is up to 75 percent, unless the student works in the public sector or for a private nonprofit organization); 42 U.S.C. § 2753(b)(5)(A)(ii) (2001) (stating that the number of students employed during an academic year in positions with a Federal share greater than 75 percent cannot exceed 10 percent); 42 U.S.C. § 2753(b)(2) (2002) (providing that funds given to higher education institutions may be used to “make payments to students participating in work-study programs”); 42 U.S.C. § 2753(b)(5) (2002) (stating that the federal share should not exceed 75 percent unless it falls within an exception). See 42 U.S.C. § 2753(c)(2) (2002) (stating that up to 25% of the funds provided may be used for the private sector employment program); 42 U.S.C. § 2754 (2002) (permitting other sources to cover the employer’s share).

\textsuperscript{382} 42 U.S.C. § 2753(c)(3) (2002).

\textsuperscript{383} See U.S. Dep’t of Education, Public Four-Year Colleges and Universities: Higher-Priced States, http://www.ed.gov/pubs/collegecosts/pubhigher.html (last visited Mar. 5, 2005). Note that there is insufficient information about students with family incomes of $60,000 or higher. Id.

\textsuperscript{384} 42 U.S.C. § 2753(c)(4) (2002).

\textsuperscript{385} See U.S. Dep’t of Education Office of the Under Secretary, The National Study of the Operation of the Federal Work-Study Program: Summary Findings from the Student and Institutional Surveys, 2000, at 14, available at http://www.ed.gov/offices/OUS/PES/finaid/FWS_summary_dec_2000.pdf. MELANIE PHARR MAJORINO, A STUDY OF FEDERAL COLLEGE WORK-STUDY STUDENTS AT THE UNIVERSITY OF MEMPHIS: AN ANALYSIS OF JOB EXPERIENCES, WORK PLACEMENT, AND ESTIMATES OF GAINS 54-55 (May 2001). Even on-campus jobs that might seem related to academic experience have proven otherwise. Most students reported performing menial tasks, and even in “Research and Laboratory Experiences,” students were dissatisfied as assignments were random and not related to their field of interest.

\textsuperscript{386} The National Study of the Operation of the Federal Work-Study Program, supra note 385, at 14. See also, MARY RITTER HEITKEMPER, WORK-STUDY EXPERIENCE OF COLLEGE GRADUATES AS IT RELATES TO THE TRANSITION TO WORK AND JOB SATISFACTION 47 (1998) (“The more career-related the placement, the stronger the impact of a student’s educational plan and career goals; and students whose strongest career-related work experiences occurred in their later years of college were more likely to say the work influenced their career goals.”).
providing cheap labor to employers at the expense of the students' academic pursuit or career interests.\footnote{387} Federal work-study programs could be modified to subsidize larger numbers of college students and open the door for high school seniors to work in public and private sector jobs that actually train students to perform skills related to their academic pursuit or career interests. For example, the U.S. National Security Agency (NSA) has a work-study program for high school seniors that offers positions for computer aides and accounting and clerical assistants.\footnote{388} For students who want to go to college to pursue a major in accounting or in a computer-related field, this program provides a chance for students to get on-the-job training, a first step in fulfilling their long-term goal of securing well-paying jobs after graduating from college.\footnote{389} For those seniors lacking the resources to go to college immediately after graduating from high school, the work-study program provides a chance to obtain the basic skills necessary in an office setting and to inculcate a strong work ethic.\footnote{390} Moreover, the students can be motivated to aim for college by interacting with college-educated professionals. Other work-study programs should be considered to develop the best possible model for a work-study program for employers to adopt.\footnote{391}

In addition to the work-study program, the government could provide tax benefits and other incentives to encourage businesses to hire

\footnote{387}{See, e.g., MAIORINO, supra note 385, at 54-55. According to one study, students at the University of Memphis are regularly performing “simple office tasks of photocopying materials, running errands, and refilling paper work.” Id. at 54. Unfortunately, only 50% use a computer “very often.” Id. This translated into over half of the students never having typed a document, drafted a memo, or proofread a document. Id. at 55. See generally Ralph Steinebrickner & Todd Stinebrickner, Working During School and Academic Performance, 21 J. LAB. ECON. 2 (2003) (claiming that working during the first semester of college harmed students’ academic performance). But see Marzick, supra note 380, at 15 (stating that work-study students are better at time management).}

\footnote{388}{The job positions available include “Accounting Assistant (handle ledgers and analyze and maintain vital financial records)” and “Computer Aides (operate our data processing equipment, often the most sophisticated equipment on the market).” See National Security Agency, High School Student Program, http://www.nsa.gov/careers/students_3_2.cfm (last visited July 29, 2005).}

\footnote{389}{Id.}

\footnote{390}{HEITKEMPER, supra note 386, at 48 (demonstrating that work study positions have often proven to be a direct route to full-time employment).}

\footnote{391}{For instance, the City of Phoenix offers more than the NSA because, in addition to getting paid, high school students are able to get class credits for their training experience and the City of Phoenix provides them with unemployment and industrial insurance benefits. See City of Phoenix, Student Work Study Program, http://phoenix.gov/HUMANSERVICES/swsp.html (last visited July 29, 2005). Furthermore, students take monthly training classes at Arizona State University to “reinforce their academic and occupational training, motivate their efforts to stay in school and to encourage their future involvement in public sector employment.” Id.}
workers for whom higher education is inaccessible or unaffordable. For example, under the Community Renewal Tax Relief Act, some businesses have taken advantage of federal tax breaks available for employers who hire youths in impoverished urban areas in order to create more jobs and build businesses to revitalize communities. To counteract the urban flight by businesses and the problems associated with it, the government has three incentives: tax credits for wages, depreciation deductions on business credits, and tax-exempt bonds to finance the building of infrastructure. Currently, Work Opportunity Tax Credit translates into a business receiving a tax credit of up to $750 per qualifying employee. In addition, businesses receive a wage credit of up to $2,100 for each person hired who qualifies as a “high-risk youth” and resides in an empowerment zone or enterprise community. Tax credits could be expanded for businesses that hire high school students in communities with low college enrollment rates.

Modifications to work-study and tax incentive programs would widen access to college for highly motivated high school graduates, such as the young men in the story of “Stinky.” Four students from a small high school in Phoenix, Arizona beat top engineering colleges, including Massachusetts Institute of Technology, in an underwater robot competition. In a competition where these Hayden High School

393. Audrey G. McFarlane, Race, Space, and Place: The Geography of Economic Development, 36 SAN DIEGO L. REV. 295, 339 (1999) (noting that the goal of the Empowerment Zones Program is to bring businesses back to urban areas with “racialized black and classified poor”).
394. See James Todd Mayer & Mark Joseph Nora, Empowerment Zones and Commercial Development, MONDAQ BUS. BRIEFING, Aug. 6, 2004, at 55. See also Kimberly Hendrickson, Bush and the Cities, POL’Y REV., Aug. 1, 2004, at 24 (stating that former President Clinton’s “signature initiative, the Empowerment Zone and Enterprise Community (EZ/EC) program was a politically savvy mix of community grants and private incentives, providing funds for local governments, nonprofits, and businesses”). Under this program, selected urban cities are given tax breaks and block grants, and businesses receive tax incentives to establish businesses in depressed areas. Id.
395. See Mayer & Nora, supra note 394, at 55.
396. See id. at 55 (noting that states and local municipalities also offer incentives to businesses in enterprise communities, such as sales, property, real estate transfer, and investment tax exemptions). The Work Opportunity Tax Credit also offers opportunities to those on food stamps, veterans, and needy families. Unfortunately, this credit was to be phased out in 2005, and is still desperately needed. U.S. Dep’t of Labor, Work Opportunity Tax Credit, http://www.uses.doleta.gov/wotcdata.asp (last visited July 29, 2005).
397. Nightline: Stinky (ABC television broadcast, May 27, 2005) (transcript found on LexisNexis). See also Joshua Davis, La Vida Robot: How Four Underdogs from the Mean Streets of Phoenix Took on the Best from M.I.T. in the National Underwater Bot Championship,
students were the only high school students competing, the students amazed the judges with a technical writing presentation and an interview during which the judges saw the students display what Stinky, their unsophisticated robot, could do. Unfortunately, the students did not qualify for federal student loans because they are all undocumented aliens from Mexico. These students live in a neighborhood where $9,000 is the average per capita income, where most of the students qualify for the free lunch program, and where two-thirds of the adults in their school district lack a high school diploma.

After winning the robotic competition, two of the students graduated with dreams of attending a four-year college; however, one currently works as a cook and a dishwasher, and the other barely scraped enough money together to enroll in a community college. In the months that followed, generosity from the media attention given to this “David beats Goliath” story resulted in the creation of a $60,000 scholarship fund, enough to finance the education of one student at a four-year university with a reputable engineering program. Unless that generosity continues to flow, most of the talented and deserving Hayden High School students will not have enough money to finance a desperately-wanted college education. Despite their proven talent, the students who won the competition have not been offered an entry-level position of any kind at a technology-related business. Being hired by such a firm could entitle the graduates to good benefits, such as a tuition reimbursement program, which enables employees to obtain a college education while maintaining employment.


398. The young men received extra points for their ability to think on their feet when a leak occurred in the robot. Nightline: Stinky, supra note 397. Using a box of tampons, the students plugged the leak, and this ingenuity won them the top prize. Id.

399. Id. (stating the names of the students are Luis Aranda, Oscar Vazquez, Lorenzo Santillan, and Cristian Arcega). See Immigration Reform and Immigrant Responsibility Act (IRAIRA), Pub. L. No. 104-208 (1996); Victor Romero, Postsecondary School Education Benefits for Undocumented Immigrants: Promises and Pitfalls, 27 N.C.J. INT’L L. & COM. REG. 393, 399-400 (2002) (discussing IRAIRA’s general objective of deterring illegal immigration, stating that “this postsecondary education law protects U.S. citizens from discrimination by a state that might be inclined to grant in-state tuition benefits to some but not others,” and asserting that “Congress wanted to ensure that undocumented immigrants would not be made better off than U.S. citizens by some states”).

400. See Nightline: Stinky, supra note 397.

401. Id.

402. Id. (stating that because tuition at Arizona State University is averaging about $15,000 a year, $60,000 is only enough for one of the young men to obtain a degree).

403. See id.
For reasons too complex to explore here, many barriers prevent high school graduates from earning college degrees. Employer-sponsored and government-subsidized initiatives and programs can enable intelligent high school graduates to find entry-level employment and demonstrate their competency.

CONCLUSION

In a commencement speech at Stanford University, Steve Jobs, founder of both Apple Computers and Pixar Animation Studios, told the graduating class of 2005 that dropping out of college was one of the best decisions he ever made because it gave him the time to pursue his passions and take a calligraphy course—a pivotal step in the making of the first Macintosh computer. However, he dropped out in the early 1970’s when bright young people lacking a college degree could still qualify for a host of well-paying jobs. Rather than romanticizing entrepreneurial stories about how a few Americans in the olden days became extremely wealthy without ever obtaining a college degree, high school graduates must face the stark reality that employers either require or prefer college graduates over non-college graduates. With this backdrop of pervasive credentialism and a massive job loss due to corporate downsizing, restructuring, and outsourcing, bogus degree providers have convinced thousands of consumers to buy fake degrees by pushing the buttons of job insecurity and individual recognition and entitlement. Employers are partially responsible for the demand for fake

404. See Tanya Schevitz, Apple CEO Hits Serious Note at Stanford: In Keynote Speech, Jobs Tells Graduates Not to Waste Time, S.F. CHRON., June 13, 2005, at B1. In his speech, Jobs stated: Because I had dropped out and didn’t have to take the normal classes, I decided to take a calligraphy class . . . . It was beautiful, historical, artistically subtle in a way that science can’t capture, and I found it fascinating. None of this had even a hope of any practical application in my life. But ten years later, when we were designing the first Macintosh computer, it all came back to me. And we designed it all into the Mac. It was the first computer with beautiful typography. If I had never dropped in on that single course in college, the Mac would have never had multiple typefaces or proportionally spaced fonts. And since Windows just copied the Mac, it’s likely that no personal computer would have them. If I had never dropped out, I would have never dropped in on this calligraphy class, and personal computers might not have the wonderful typography that they do.

405. A search of available positions at Job’s company, Pixar, reveals that most positions require the applicant to have at least a bachelor’s degree. See Pixar, Job Search, http://jobsearch.pixar.careers.monster.com/jobsearch.asp?col=dlt&sort=rv&vw=b&fn=8257&q=

(last visited July 29, 2005).
degrees because they overly rely on education credentials to make hiring and promotion decisions. Employers spare themselves the time and expense of evaluating prospective employees when they use four-year college degrees as a means of vetting job applicants. When employers reasonably deem soft skills and certain occupational skills relevant, they should look to community college graduates who are obtaining degrees and certifications customized to meet employers’ needs. Otherwise, the doors of opportunity will be unfairly closed to those who cannot afford higher education at four-year institutions or meet their standards for admission.

Given the likelihood that credentialism results in a disparate impact on classes of non-degree holders and that employers cannot prove college degrees are a business necessity for many jobs, employers should bear part of the cost of identifying competent non-credentialed employees by actually assessing the skills of applicants. Moreover, federal and state governments should modify work-study and tax incentive programs to encourage employers to allow more high school graduates to have access to entry-level positions with career advancement potential. By opening the doors of employment to those with high school diplomas, employers and governmental agencies can promote the pursuit of legitimate education credentials. Corporate America and higher education institutions, particularly community colleges, can expand collaborative efforts to enable students to cost-efficiently acquire the kind of post-secondary education that imparts the skills necessary for America’s workforce to be competitive in a global economy.