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When Binding Doesn't Really Mean Binding: The Early Decision College Application

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WHEN BINDING DOESN'T REALLY MEAN BINDING: THE EARLY DECISION COLLEGE APPLICATION

Jean Steadman[1]

ABSTRACT

Colleges offer a pathway to college admission with the binding Early Decision[2] *application. The Early Decision application has two key elements: prospective students are given an admission decision earlier than the typical spring acceptance notification date and, more importantly, the Early Decision application is binding on the prospective student. If a prospective student is accepted into a college under the Early Decision process, they must withdraw all other outstanding applications. Prospective students are repeatedly advised on the binding nature of the Early Decision application process and are well aware that, by utilizing this process, they are forming binding agreements.*

Legally speaking, the Early Decision application is only one element of the contract formation process. Whether it is qualified as an invitation to offer or an offer, the mere submission of the Early Decision application does not create a binding contractual relationship. This conclusion is supported by the fact that no college has signaled any interest in legally enforcing a binding Early Decision agreement. In fact, colleges acknowledge that the Early Decision application is, at best, a moral obligation or ethical agreement with no legal effect. However, colleges continue to promote the binding nature of Early Decision applications and do nothing to correct this misconception with their prospective students.

Student-college contracts have been extensively researched, interpreted, and adjudicated over the years. With the advent of the Early Decision application, this Article examines the contracting process and reaches the conclusion that the Early Decision application is not, in fact, legally binding because no enforceable contract has been formed by the application alone. However, colleges have little incentive to share their true interpretation of the term "binding" as applied to the Early Decision application. Barring judicial review of the enforceability of the Early Decision application as a legal agreement, prospective students will continue to base their college application choices on an erroneous belief that "binding" really means binding.

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[2] *See infra* note 6.

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I. INTRODUCTION

Seventeen-year-old Thomas is applying to several colleges.[3] He has earned impressive grades and participated in various extra-curricular activities. He applies to several top-tier colleges under the Regular Decision ("RD") admission process[4] because he is unsure about his future plans. Weeks later, he receives a letter from one of his preferred colleges asking him to consider converting his RD application to an Early Decision ("ED") application.[5] The college correspondence explains that by converting his application status, Thomas will be committing to withdraw all his other outstanding applications if he is accepted to the college under ED. The letter makes it clear to Thomas that the ED application process is binding. Thus, Thomas reasonably concludes that he is, in fact, a competitive candidate, and he must decide if he is prepared to convert his application status. While Thomas was initially unsure about his college choices, now he is seriously considering converting his RD application to ED, but he is concerned about being bound under this application.

Jake, another high school senior, decides to directly apply ED to one college and RD to several others. He signs and submits the ED application, which is also signed by a parent and high school guidance counselor. Jake's ED application is accepted, but Jake has since determined a different college is a better fit. He wants to refrain from withdrawing his other applications and attend the other college but has concerns that he will he face repercussions from the college that accepted him under the ED process. Jake justifiably believes he understands what the term binding means.

When high school seniors like Thomas and Jake begin the application process to college, one of the first decisions they face is choosing which admissions process best suits their goals. Students and parents quickly discover that there is more than one path to college admission; in fact, there are as many as five application paths to college acceptance and enrollment.[6]

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[3] For the purposes of this Article, the Author chose to use the general term "college" when referencing any higher education institution.

[4] *See infra* note 6.

[5] *See infra* note 6.

[6] *Guide to Ethical Practice in College Admission*, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING ("NACAC"), 1, 10–11 (Sept. 2020), https://www.nacacnet.org/globalassets/documents/advocacy-and-ethics/nacac_guide-to-ethical-practice-in-college-admission_sept.-2020_final.pdf [https://perma.cc/ZL6W-9M27] (There are three non-restrictive application plans and two restrictive application plans. The nonrestrictive plans include: (1) Early Action ("EA") where students apply by an earlier deadline to receive a decision in advance of the college's Regular Decision notification date; (2) Regular Decision ("RD") where students submit their applications by a specified deadline and are notified of a decision within a clearly stated period of time; and (3) Rolling Admission ("RA") where students apply at any time after a college begins accepting applications until a

A high school student navigating this complicated process may struggle to understand the academic requirements and legal ramifications of each admissions path. Additionally, while high school counselors have the yeoman's job of advising the student, colleges provide admissions information that, at best, is confusing and, at worst, misleading.

Most colleges, as members of the National Association for College Admission Counseling ("NACAC"), agree to promote transparency, uniformity, and ethical best practices for college admissions.[7] Notwithstanding this noble mandate, colleges entirely fail to clarify their lack of intent to be bound to a legally enforceable agreement based upon the ED application.[8] Colleges quietly acknowledge that the ED application only results in an honor-based or ethical agreement.[9] Colleges do not share this critical information with their prospective students. Thus, a prospective student is led to believe that the ED application is legally binding while colleges know the ED application is only morally binding.[10] In fact, colleges typically seek extra-contractual means of enforcement in lieu of seeking legal remedies for breach of a binding ED agreement. Students who continue to base where they apply to college on an erroneous understanding of what binding means may suffer a negative impact when enrolling in a college.

Does conversion of an RD application to an ED application or the initial submission of an ED application with the understanding that the application triggers a binding commitment ignore long-established contract law principles on the contract formation process? Will Thomas or Jake be legally bound to their respective colleges upon the mere submission of an ED application for admission? Contracts are the legal mechanism that manifest legally binding obligations and reciprocal rights that may be enforced once mutual assent and consideration are present.[11] Thus, only once a contract has been formed, may a college correctly state that an applicant has made a legally binding agreement.

The college ED application and process, specifically, lead to several important legal questions. Is the ED application for admission to a college an offer by the student that upon the college's acceptance creates a binding

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final closing date, which may be as late as after the start of the term for which they are applying, and students are notified of a decision as their applications are completed and reviewed. The restrictive plans include: (1) Early Decision ("ED") where students commit to a first-choice college at the time of applications and, if admitted, agree to enroll and withdraw their other college applications (students may be required to accept the college's ED offer of admission and submit a deposit prior to May 1); and (2) Restrictive/Single Choice Early Action ("REA") where students apply to a college of preference and receive an admission decision in advance of the Regular Decision notification date.).

[7] *Id.* at 3–5.

[8] *See infra* Part II.E.

[9] *See infra* Part VI.

[10] *See infra* Part VI.

[11] Krystyna Blokhina Gilkis, *Contract*, LEGAL INFO. INST. (July 2019), https://www.law.cornell.edu/wex/contract [https://perma.cc/5DDY-HJFJ].

agreement? If the application for admission is not an offer, is the offer of admission, i.e., acceptance for enrollment by the college, the actual contract offer? Do college admissions processes ignore the basic tenets of contract law and principles of freedom of contract and freedom from contract, or do they simply obfuscate contractual rights and obligations by blurring the time of formation? If Thomas converts his RD application into an ED application, and he is subsequently accepted to the college, is he really legally bound to withdraw his other applications? Finally, if Jake is accepted for enrollment through the ED application process and fails to withdraw his other applications, will the college sue or penalize him for breach of contract?

While much has been written about the student-college contractual relationship, little attention has been given to the contractual ramifications of the ED application process. This Article explores whether the ED college application forms a binding legal agreement between prospective students and colleges and determines that the ED application merely satisfies one of several necessary elements of the contract formation process.[12] Thus, submitting an ED application alone will not create a legally binding contract. Furthermore, while this Article does not focus on the legal propriety of colleges' actions by qualifying the ED application as binding, it does recognize that by providing inaccurate information, colleges compromise the student-college contract formation because the parties do not share the same meaning of "binding."[13]

[12] *See infra* Part V.
[13] *See infra* Parts V & VI.

II. THE COLLEGE APPLICATION PROCESS[14]

Students like Thomas and Jake typically begin the college application process in the fall semester of their senior year of high school. Once seniors have identified the schools that interest them, they begin the application process, which spans several months until early spring when colleges announce their decisions.[15]

During the application process, high school seniors face a series of initial procedural choices as soon as they identify their schools of choice. One of the first decisions is the choice of admission plan or process.[16] Students may choose to apply through various processes, depending on each college's admissions requirements.[17] Colleges may fare better by

[14] This Article will not address the impact that ED and other application processes have on socio-economic diversity and financial aid issues. However, a near universal consensus exists that ED benefits wealthy students from prestigious schools, private tutoring and test prep companies, and top-tier colleges. *See* Heather Antecol & Janet Kiholm Smith, *The Early Decision Option in College Admission and Its Impact on Student Diversity*, 55 J.L. & ECON. 217, 220–21 (2012); James Fallows, *The Early-Decision Racket*, THE ATLANTIC (Sept. 2001), https://www.theatlantic.com/magazine/archive/2001/09/the-early-decision-racket/302280/ [https://perma.cc/MC36-GLCP]; Abril Castro, *Early Decision Harms Students of Color and Low-Income Students*, CTR. FOR AM. PROGRESS (Nov. 4, 2019), https://www.americanprogress.org/issues/race/news/2019/11/04/476789/early-decision-harms-students-color-low-income-students/ [https://perma.cc/9FG7-9QK2]; Anya Kamenetz, *5 Ways Elite-College Admissions Shut Out Poor Kids*, NPR (Jan. 15, 2016), https://www.npr.org/sections/ed/2016/01/15/462149341/5-ways-elite-college-admissions-squeeze-out-poor-kids [https://perma.cc/3F7A-2EDZ]; Courtney Pinto, *Equity, Not Equality, in College Admissions*, INSIDE HIGHER ED (Aug. 23, 2021), https://www.insidehighered.com/admissions/views/2021/08/23/equity-not-equality-should-be-goal-college-admissions-opinion [https://perma.cc/5RBX-3TTL]; *Who Benefits From Early Decision?*, COLLEGIATE GATEWAY (Mar. 14, 2019), https://collegiategateway.com/who-benefits-from-early-decision-2/ [https://perma.cc/SW69-ZDHR].

[15] For a comprehensive explanation of the college admissions process, the author recommends CHRISTOPHER AVERY, ANDREW FAIRBANKS & RICHARD ZECKHAUSER, THE EARLY ADMISSIONS GAME: JOINING THE ELITE (Cambridge et al. eds., 2003).

[16] *See* Josh Moody, *What to Know About Early Action and Early Decision*, U.S. NEWS & WORLD REP. (Mar. 20, 2020), https://www.usnews.com/education/best-colleges/articles/what-to-know-about-early-action-early-decision-in-college-admissions [https://perma.cc/ZD8Q-22PS] (College Board provided information showing that 450 colleges offer at least one of the ED or EA application options.).

[17] *See* Antecol & Smith, *supra* note 14, at 220–21. The admission option known as ED gained popularity in the late 1950s and 1960s. *Id.* at 221. The ED option is often credited as the invention of various colleges working together in order to position themselves more competitively with the Ivy League schools. *Id.* at 221–22. Some credit the "Seven Sisters": "Barnard College, Bryn Mawr College, Mount Holyoke College, Radcliffe College, Smith College, Vassar College, and Wellesley College." *Id.* at 220 n.5. These schools began experimenting with ED programs around 1959. . . . By the mid-1970s, all the Ivy League schools and the Massachusetts Institute of Technology (MIT) had adopted early admissions

attracting competitive applicants if they do not offer all the admission plan options. While applicants are competing for limited openings at each college, the colleges are competing with one another as well.

> The colleges set the rules in the admissions game, with individual colleges changing their policies to gain competitive advantage over their rivals. They have several goals—attract applicants, admit the best, and then induce them to enroll—but relatively few instruments, primarily admissions decisions and financial aid packages, to achieve them.[18]

From the prospective student standpoint, applying ED has advantages as well: ED applicants are typically weighed against a smaller cohort of applicants and statistically, students may have greater success in being accepted under the ED process than under the RD process.[19]

With the goal of creating uniformity in the college admissions process, many college admissions departments and counselors join the NACAC.[20] The NACAC is a voluntary membership organization open to secondary and post-secondary institutions that "promote[s] the highest ethical practices and professional standards" in college admissions activities and provides training and networking for members.[21] While members are not required to follow all of the suggested guidelines that it promulgates, such guidelines, resources, seminars, and professional development work together to better inform college admissions counselors and help create transparency and consistency in explaining and policing the college application process.[22] In addition to the suggested materials, the NACAC promulgated the *Code of*

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programs—Brown University, Harvard, MIT, Princeton, and Yale initially used nonbinding EA agreements, and the others used binding ED agreements. In the late 1970s, the EA schools amended their rules to prevent students from applying to more than one school early (this type of agreement is known as restrictive early action. *Id.* at 220–21.

[18] AVERY ET AL., *supra* note 15, at 19.

[19] Padya Paramita, *Early Action and Early Decision Policies for the Top 50*, INGENIUS PREP (Aug. 26, 2020), https://ingeniusprep.com/blog/early-action-and-early-decision/ [https://perma.cc/KT62-DSF4]. A brief example of 2020–2021 acceptance rates shows that Princeton accepted 13.9% of its ED/EA applicants while it only accepted 5.8% of its RD applicants; Harvard accepted 13.4% of its ED/EA applicants and only 4.5% of its RD applicants; and Dartmouth College accepted 23.2% of its ED/EA applicants while it only accepted 7.9% of its RD applicants. *Id.*

[20] *History*, NACAC, https://www.nacacnet.org/about/history/ [https://perma.cc/XX9X-5T3M].

[21] *Id.*

[22] *See id.*

Ethics and Professional Practices[23] as "the conscience of our profession."[24] The purpose of the *Code of Ethics and Professional Practices* was to promote best practices in the college admissions process and provide information to students to help them "make thoughtful choices about their futures . . . guided by principles of honesty, integrity, transparency, equity, fairness, and respect."[25]

In 2019, the United States Department of Justice ("DOJ") identified elements of the *Code of Ethics and Professional Practices* that it considered anti-competitive and in violation of Section 1 of the Sherman Antitrust Act.[26] Specifically, the DOJ's Antitrust Division investigated the NACAC for

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[23] *Code of Ethics and Professional Practices*, NACAC (Sept. 2019), https://www.nacacnet.org/globalassets/documents/advocacy-and-ethics/cepp/cepp_10_2019_final.pdf [https://perma.cc/RDN3-MKNE]; *see Statement of Principles of Good Practice*, NACAC (2016), https://www.nacacnet.org/globalassets/documents/advocacy-and-ethics/cepp/statement-of-principles-of-good-practice-spgp-with-highlights.pdf [https://perma.cc/JV5L-W2XJ]. The *Code of Ethics and Professional Practices* was previously titled the *Statement of Principles of Good Practice* ("SPGP"). *Statement of Principles of Good Practice*, at 1. The SPGP included a series of "Member Conventions," which represent a set of understandings or agreements to frame our code of ethics. These statements are the purview of the Board of Directors. All members of NACAC agree to abide by the following:

> 1. Members will make protecting the best interests of all students a primary concern in the admission process.
> 2. Members will evaluate students on the basis of their individual qualifications and strive for inclusion of all members of society in the admission process.
> 3. Members will provide accurate admission and financial aid information to students, empowering all participants in the process to act responsibly.
> 4. Members will honor students' decisions regarding where they apply and choose to enroll.
> 5. Members will be ethical and respectful in their counseling, recruiting and enrollment practices.
> 6. Members will strive to provide equal access for qualified students through education about financial aid processes and institutional financial aid policies.
> 7. Members will abide by local, state and federal laws regarding the treatment of students and confidential information.
> 8. Members will support a common set of admission-related definitions and deadlines.
> 9. Members will support and enforce the Statement of Principles of Good Practice.

Id. at 2.

[24] *See Code of Ethics and Professional Practices*, *supra* note 23, at 1.

[25] *Id.*

[26] Complaint at 31, U.S. v. Nat'l Ass'n for Coll. Admission Counseling, No. 19-cv-03706-BAH, 2020 WL 3044153 (D.D.C. Apr. 17, 2020) (No. 19-cv-03760), 2019 WL 6790660 (asserting violation of the Sherman Antitrust Act, 15 U.S.C. § 1).

possible illegal restraints on colleges competing for and recruiting students.[27] In December 2019, the DOJ filed a complaint in the U.S. District Court for the District of Columbia[28] and provided NACAC with a proposed consent decree in the form of a proposed final judgment.[29] The complaint alleged that the recruiting rules agreed upon in the *Code of Ethics and Professional Practices* served no legitimate purpose and were not necessary to promote open and equitable college admissions.[30] The NACAC agreed with the proposed final judgment to remove any recruiting rules that related to any ED incentive rule, transfer student recruiting rule, or first-year undergraduate recruiting rule,[31] and the court issued a final judgment approving the proposed consent decree in April 2020.[32] Neither the DOJ nor the NACAC addressed the fact that the ED application is marketed as

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[27] *Id.* at 6.

[28] *Id.* at 32.

[29] [Proposed] Final Judgment, U.S. v. Nat'l Ass'n for Coll. Admission Counseling, No. 1:19-cv-03706 (Dec. 12, 2019), https://www.justice.gov/atr/case-document/file/1226121/download [https://perma.cc/5MVV-WSWA].

[30] Complaint at 3–5, *supra* note 26.

> 3. One condition of membership in NACAC is adherence to NACAC's Code of Ethics and Professional Practices ("CEPP" or "Ethics Rules"), which sets forth mandatory rules for how member organizations engage in college admissions. These rules are drafted, voted on, and enforced by NACAC members.
>
> 4. As part of its CEPP, NACAC includes certain rules regarding the recruitment of students by colleges. Prior to September 2019, among these rules were ones that prevented, or severely limited, colleges from (1) directly recruiting transfer students from another college, (2) offering incentives of any kind to college applicants who applied via a process known as Early Decision, and (3) recruiting incoming college freshmen after May 1 (together, "Recruiting Rules").
>
> 5. The Recruiting Rules were not reasonably necessary to any separate, legitimate procompetitive collaboration between NACAC members. As part of its CEPP, NACAC establishes many rules and regulations for its members' conduct throughout the college admissions process, including, among others, when applications may open and close, the definitions of Early Decision and Early Access, and the use of paid agents in recruiting students. Many of these rules appear to strengthen the market for college admissions. The Recruiting Rules, however, were not reasonably necessary to achieve the otherwise market-enhancing rules contained in the CEPP, and furthermore had the effect of unlawfully restraining competition among NACAC's college members, resulting in harm to college applicants and potential transfer students.

Id.

[31] [Proposed] Final Judgment, *supra* note 29, at IV.

[32] Final Judgment, U.S. v. Nat'l Ass'n for Coll. Admission Counseling, No. 1:19-cv-03706-BAH, 2020 WL 3044153, at *2 (D.C.C. Apr. 17, 2020).

creating a binding agreement, nor did they address the meaning of a "binding" agreement.[33]

As a result of the DOJ investigation and subsequent final judgment, the NACAC discontinued the *Code of Ethics and Professional Practices* and replaced it in 2020 with the new *Guide to Ethical Practices in College Admission.*[34] The *Guide to Ethical Practices in College Admission* is the current NACAC "statement of recommendations that the Assembly believes best promotes ethical and best practices in college admission."[35] The *Guide to Ethical Practices in College Admission* sets forth a comprehensive series of "Recommended Practices" related to college admissions.[36] Section III: Application Plans, Definitions of Procedures, and Glossary specifically includes introductory language that places a premium on uniformity and transparency, stating that the NACAC strives to uphold such in the application process through uniform application of standardized definitions.[37] The definitions of admissions procedures set forth in the *Guide to Ethical Practices in College Admission* and the additional NACAC handout, *Definitions of Admission Options in Higher Education*, are qualified as: early decision ("ED"); early action ("EA");[38] restrictive early action ("REA"); rolling admission ("RA"); and regular decision ("RD").

Of the various types of admissions processes, the ED choice is the most labored over by students and discussed by colleges. It is also arguably the least successful in terms of actual transparency and clarity.[39] Conceptually, ED is largely homogenous and is defined with few variations. The ED process allows students to apply to college early and receive a response earlier than the typical college admissions response time in the spring. Students commit to a first-choice college at the time of application and, if admitted, they agree to enroll and withdraw their other college applications. Colleges may offer ED I or II with different deadlines.

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[33] *See generally id.*

[34] *Guide to Ethical Practice in College Admission*, *supra* note 6.

[35] *Id.* at 2.

[36] *Id.* at 3–9. Topics include admission cycle dates, deadlines, and procedures for first-time fall entry undergraduates; wait lists; transfer admission; international admission; truthfulness and transparency: guiding principles and rationale; and professional conduct. *Id.*

[37] *Id.* at 10. ("NACAC members believe it benefits members and the students they serve when there is clarity and consistency to a process that can be complicated and confusing. To help clarify the process, members are encouraged to use the following definitions for application plans and other admissions terms.").

[38] *Definitions of Admissions Options in Higher Education*, NACAC, www.nacacnet.org/globalassets/documents/publications/DefinitionsofAdmissionOptionsinHigherEducation.pdf [https://perma.cc/GS93-24C6]. EA or Early Action is defined as the process in which "[s]tudents apply early and receive a decision well in advance of the institution's regular response date." *Id.* This is a non-binding commitment. *Id.*; *see Guide to Ethical Practice in College Admission*, *supra* note 6, at 10; MICHELE A. HERNÁNDEZ, A IS FOR ADMISSION: THE INSIDER'S GUIDE TO GETTING INTO THE IVY LEAGUE AND OTHER TOP COLLEGES 33 (1997).

[39] *See Guide to Ethical Practice in College Admission*, *supra* note 6, at 10–11.

Students may be required to accept a college's offer of admission and submit a deposit prior to May 1. Colleges using an Early Decision application should:

- Not make Early Decision the only application option for admission.
- Notify candidates of the admission decision within a clearly stated period of time.
- Respond to an application for financial aid at or near the time of an offer of admission and before a deposit is required.
- Release applications from the Early Decision agreement if the candidate is:
  - Denied admission.
  - Deferred to an admission date other than that stated on the original application.
  - Offered a program or major that is different from that stated on the original application.[40]

The weakness of the ED application lies in its lack of lack clarity as to the binding nature of the process. The ED option "[s]upersedes all other applications. Immediately upon acceptance of an offer of admission, a student must withdraw all other applications and make no other applications."[41] The *Princeton Review* explains that the "[e]arly decision is binding. This means if you are accepted through early decision, you are committed to attending that school, and will withdraw any applications you may have submitted for the regular deadlines to other schools. You may not apply to more than one college under early decision."[42] Simply put another way, accepting an ED offer of admission is required because the ED offer is binding. While these definitions of the binding nature of the ED application all follow the same pattern, that "binding" means binding, none of them distinguish or elaborate on the difference between morally binding and legally binding agreements.

Under the alternative RD, RA, and EA processes, a student is not restricted from applying to multiple schools nor is the student's

[40] *Id.* Early Decision outcomes are "Accept," "Reject," or "Defer". *Id.* If a student is "deferred," their application is routed to the regular admission candidate pool for consideration. *Id.*

[41] AVERY ET AL., *supra* note 15, at 47; *see Guide to Ethical Practice in College Admission*, *supra* note 6.

[42] Rob Franek, *Should You Apply Early Action vs Early Decision?*, THE PRINCETON REV., https://www.princetonreview.com/college-advice/early-action-vs-early-decision [https://perma.cc/T3DG-3DJA].

commitment binding upon acceptance.[43] Only the ED and REA application processes are considered restrictive or binding by colleges,[44] and thus, colleges openly assert that they consider students who apply through these processes bound to both attend the institution upon acceptance and to follow through with the restrictive requirement of withdrawing any outstanding applications at other institutions. Furthermore, colleges reinforce the gravity of the binding ED application process by requiring an applicant's parent and high school counselor to sign the application.[45] The net effect of the ED application process is that students understand that they can only apply to one school under this qualification due to its binding nature.

The authors of *The Early Admissions Game* purposely use the term "game" in their tome, explaining the history, data, and strategies in the ED application process "[b]ecause early applications programs have transformed college admissions from a relatively straightforward process into a complicated strategic arena."[46] The creation of multiple admission pathways also shines a light on adversarial aspects of the admissions process.[47] As prospective students apply to multiple schools, the institutions found ways to "[m]anipulate the timing of the application process to their own advantage."[48]

Relying on information provided by colleges, high school counselors, and college admissions counseling businesses, Thomas and Jake likely believe any ED application and eventual acceptance will create a binding commitment that they cannot simply walk away from. This belief is reasonable if Thomas and Jake do not understand the law of contracts or do not pursue a legal review.

Thomas and Jake may apply to college directly through a college's website or portal, or through a processing service, such as the Common App website, which is owned and operated by the College Board[49] or the

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[43] *Definitions of Admissions Options in Higher Education*, *supra* note 38.

[44] *Id.*

[45] *Early Decision Agreement*, COMMON APP, https://commonapp.my.salesforce.com/sfc/p/#d0000000eEna/a/0V000001Avzl/5d1XX0Np996VeBzy8wRolENTg2XLqU8E7mJmpwMgk1s [https://perma.cc/TX59-KJMQ].

[46] AVERY ET AL., *supra* note 15, at 2. The authors further state, "We see the whole college admissions process as a giant game, with roughly 1 million new applicants and more than 1,700 four-year colleges playing each year. . . . The students are competing with one another, as are the colleges. But there is also a subtle game between the applicants and the colleges." *Id.* at 12.

[47] *Id.* at 24. As early as the 1950s, when applicant trends revealed the propensity to submit multiple applications, the institutions "[l]abeled students as selfish if they did not withdraw applications to other colleges immediately after learning of admission to a likely top-choice school." *Id.*

[48] *Id.*

[49] *Explore Colleges*, COMMON APP, https://www.commonapp.org/explore/

Universal College Application.[50] For Common App users, the College Board ED and EA website includes disclaimer-like language specifying:

> Early decision plans are binding – a student who is accepted and an ED applicant must attend the college.
>
> ED applicants:
>
> - Apply early (usually in November) to first-choice college.
> - Receive an admission decision from the college well in advance of the usual notification date (usually by December).
> - Agree to attend the college if accepted and offered a financial aid package that is considered adequate by the family.
> - Apply to only one college early decision.
> - Apply to other colleges under regular admission plans.
> - Withdraw all other applications if accepted by ED.
> - Send a nonrefundable deposit well in advance of May 1.[51]

The actual Common App ED Agreement is limited to one page.[52] The 2020 Common App ED Agreement references the binding nature of the document by stating, "Before completing this form, please consult the instructions for early decision on the college's website. The ED Agreement is required only for candidates who have chosen to apply via the binding early decision plan to their first-choice institution."[53] The ED Agreement "Instructions" provide "[i]f the student is accepted under an early decision

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[https://perma.cc/Y5FD-JHJL]. The Common App website boasts that more than 900 colleges use the Common App for college applications. *Id.*; *see* Briana Boyington & Josh Moody, *The Common App: Everything You Need to Know*, U.S. NEWS & WORLD REP. (Aug. 2, 2021), https://www.usnews.com/education/best-colleges/articles/common-app [https://perma.cc/M8HT-YUDN].

[50] *Colleges*, UNIVERSAL COLL. APPLICATION, https://www.universalcollegeapp.com/schools [https://perma.cc/D9TV-7KTU]. The Universal College Application website boasts two colleges using the service for college applications: University of Charleston West Virginia and University of the Commonwealth Global. *Id.*

[51] *Early Decision & Early Action*, COLL. BOARD, https://professionals.collegeboard.org/guidance/applications/early [https://perma.cc/HDD3-E3S8]. Furthermore, the authors of *The Early Admissions Game* note that only 122 out of 253 colleges in The College Board database subscribe to this Agreement. AVERY ET AL., *supra* note 15, at 333 n.10.

[52] *Early Decision Agreement*, *supra* note 48.

[53] *Id.*

plan, the student must promptly withdraw the applications submitted to other colleges and universities and make no additional applications to any other university in any country."[54]

The ED Agreement provides an additional notice above the signature line, requiring the student to acknowledge that they read and understood ED Agreement in general, and specifically that they recognize any ED offer of admissions may be shared with other colleges.[55] The student's high school counselor must also sign the ED Agreement, attesting that the student was advised as to the binding nature of the ED application.[56] Additionally, the student's parent or legal guardian must attest that they will ensure the student's compliance with ED Agreement.[57] The Common App website also includes a "School Counselor Information" section relating to the ED application process and sets forth detailed steps for shepherding a student through the ED process.[58]

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Early Decision with Common App*, COMMON APP, https://recsupport.commonapp.org/recommendersupport/s/article/How-ED-works-in-the-Common-App-online [https://perma.cc/8JZR-XWDF].

> If a student is applying online and applying Early Decision to an institution, it is necessary that he/she complete the Early Decision Agreement. In order to complete and submit this form the student must first select the Early Decision term option for one institution. Once this decision is selected, the ED Agreement will be available as a follow-up question within the institution's questions.
>
> 1. The student must read and sign the agreement from within his/her Common App account. He/she must then notify the counselor that he/she is applying ED.
>
> 2. The counselor must read and sign the agreement from within his/her recommendation account (if the counselor has agreed to complete recommendations online).
>
> 3. The parent/legal guardian must also read and sign the agreement. The parent/legal guardian must go to the URL (provided in the invitation), enter their email address (enter it exactly as it appears on the notification email; it is case sensitive), read and sign the ED Agreement, then submit it.
>
> 4. Students must select a parent/legal guardian at the bottom of the page in the Recommenders and FERPA section before the online agreement is sent to this person. The student should enter the "Parent/Legal Guardian" details and save the page.
>
> Lastly, the counselor will log in to his/her account to read, sign, and submit the ED Agreement as well (if the counselor has agreed to complete the recommendations online). If the counselor is not completing the recommendation online, the student must print the ED Agreement from within the Recommenders and FERPA section, obtain all required signatures and give

Furthermore, the College Board website includes an informative section devoted to "[t]he ethics of applying early decision," which outlines that high school counselors should "[s]end the student's final transcript to one college only: anything else is unethical."[59] Thus, once again, the ethical buzzword is used to reinforce the binding nature of the ED application and an obligation is placed on a high school counselor to enforce such. Slowly, the terms "binding" and "ethical" are being intertwined although no stakeholder in the college admissions process ever explicitly explains to a student applicant how they actually relate—that the ED application is binding as an ethical agreement and not a legal agreement.

The Universal College ED Application is also limited to one page and includes language that closely mirrors that of the Common App.[60]

> Yes, I wish to be considered as an Early Decision candidate at (Name of Institution). I understand that I may apply only to one institution under a binding Early Decision program and that if admitted under the Early Decision Plan, I will attend that institution (only if sufficient financial aid is offered). I further understand that if admitted to my Early Decision institution, I may not apply to other colleges or universities and must immediately withdraw applications to other colleges and universities. I further understand that it is a violation of the Early Decision Agreement for an applicant to be an Early Decision candidate at two or more institutions at the same time. The institution(s) I have applied to may discontinue my application or withdraw my offer of admission at any time if these conditions are not met.[61]

it to the counselor to send directly to the institution. Please note the counselor is responsible for the submission of the ED Agreement once the student has completed it.

After the student has selected the Parent/Legal Guardian within the drop-down, he/she will receive an email with the URL to the ED Agreement (only if the email address was provided). If the parent/legal guardian does not have an email address, his/her signature is not required online. However, the counselor must still sign his/her portion to complete the online ED Agreement process. *Id.*

[59] *Early Decision & Early Action, supra* note 54 ("The Common Application and some colleges' application forms require the student applying under early decision, as well as the parent and counselor, to sign an ED agreement form spelling out the plan's conditions.").

[60] "Under the Early Decision Plan, an applicant may apply to only one college. The Early Decision Agreement allows the applicant, family, and counselor submit acknowledgement of these conditions to the college selected by the applicant under the Early Decision plan." *Resources,* UNIVERSAL COLL. APPLICATION, https://www.universalcollegeapp.com/resources#forms [https://perma.cc/Z5CW-SAJR].

[61] *Early Decision Agreement,* UNIVERSAL COLL. APPLICATION, https://www.universalcollegeapp.com/documents/ed-agreement.pdf [https://perma.cc/W23F-KYRJ]

A brief sampling of individual college admission websites reflects language mirroring the Common App and Universal College ED Application. For example, Boston University ("BU") reminds students that if they apply ED and are accepted, they "commit to attend BU by withdrawing applications to all other schools."[62]

Furthermore, multiple college admission resources exist throughout the private sector. Companies, websites, and blogs are devoted to explaining the college admission process, and they universally define the ED application as binding.[63] Education Dynamics LLC runs the Unigo website, which offers comprehensive college admissions assistance to student applicants.[64] Unigo also provides a Q&A section on its website wherein college counselors answer questions.[65] Under the "College Admissions" heading, the question "Is early decision really binding, or can I still get out of it?" is posed, and college counselors from various schools provide their answers.[66] Every respondent answered in the affirmative stating the ED application was binding and difficult to get out of barring a financial excuse.[67]

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[62] *Early Decision at BU,* BOSTON UNIV., http://www.bu.edu/admissions/apply/early-decision/ [https://perma.cc/PE7Q-F636] ("If you are applying using the Common Application, you must indicate your interest in the Early Decision program on the BU member section of your application. This section of the web page explains the binding nature of the ED program and must be signed by the applicant, a parent or guardian, and a school counselor. If you are applying using the Coalition Application, you must select Early Decision from the Decision Plan within the Term section and download the Early Decision Agreement. This agreement explains the binding nature of the ED program and must be signed by the applicant, a parent or guardian, and a school counselor. To submit a completed Early Decision application through Coalition for College, you must upload a completed and signed Early Decision Agreement form in the Term section.").

[63] *Is Early Decision Really Binding, or Can I Still Get Out of It?*, UNIGO, https://www.unigo.com/admissions-advice/is-early-decision-really-binding-or-can-i-still-get-out-of-it [https://perma.cc/Y7X9-VRF9].

[64] *UNIGO: Engage Our Network of Active Students, Parents and Counselors*, EDUC. DYNAMICS, https://www.educationdynamics.com/unigo/ [https://perma.cc/7L8W-Z4S5].

[65] *Advice from College Admissions Experts*, UNIGO, https://www.unigo.com/admissions-advice [https://perma.cc/SF55-PUNA].

[66] *Is Early Decision Really Binding, or Can I Still Get Out of It?*, *supra* note 66.

[67] *Id.* Scott Herrmann-Keeling, College Counselor:

> The answer is it's both. Yes, it's really binding. . . . That said, nobody is going to show up at your house with a pair of handcuffs if something happens and you are unable to attend. Notice I use the word "unable." That's different from, "I changed my mind and would rather go someplace else." "Unable" means there's been a significant change in your situation in a way that affects either your ability to pay for school or your ability to physically be present on campus.

Id. Andrew Belasco, CEO, College Transitions LLC, "Generally speaking, Early Decision is binding and breaking an ED agreement usually leads to severe consequences. For example,

By the time Thomas and Jake completed their college admissions applications, they have been inundated with college admission materials and commercial resources outlining, in a myriad of ways, the fundamental binding character of the ED application. There is no doubt in the prospective students mind that the ED application is binding. But is it really binding? Are Thomas and Jake's ED applications binding on them or the schools, on both, or on neither? When are legal and enforceable contractual rights created between the students and colleges?

III. IS THE STUDENT ENTERING INTO A BINDING CONTRACT WITH THE COLLEGE BY APPLYING FOR EARLY DECISION?

Contracts are legal relationships between two or more parties. "A contract, by ancient definition, is 'an agreement between competent parties, upon a consideration sufficient in law, to do or not to do a particular thing.'"[68] With the consequence of legal enforceability, a contract gives rise to a set of rights and obligations for the contacting parties, and it creates social incentives. These incentives include limitation of the risk that the party with less information may get taken advantage of by the party with more information; the promulgation of acceptable behavioral norms to limit strategic behavior; and the creation of precedent for future clear and concise agreements. In brief, contracts create binding commitments between the parties but certainly do not exist in a vacuum; they create "ripples of consequences in all directions through society."[69]

Contract formation has been variously defined; formation requirements may be framed by the presence of definiteness and assent in the bargaining process[70] or the presence of mutual assent and consideration.[71] Regardless of the terminology used, contract formation commonalities are demonstrated through the offer and acceptance process supported by consideration.[72] The presence of an offer and acceptance

students breaking ED agreements are often 'blacklisted' by their 'ED' college and prevented from enrolling at any of their other prospective institutions for at least one year." *Id.* Rebecca Joseph, Executive Director & Founder, getmetocollege.org, "EARLY DECISION IS LEGALLY BINDING." *Id.* Edward LaMeire, CEO, LaMeire College Consulting, "If you pull out of an ED agreement, there needs to be a ludicrously convincing reason why." *Id.* Nancy Milne, Owner, Milne Collegiate Consulting, "Early decision IS binding." *Id.*

[68] Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 639 (Ill. 1977) (citing People v. Dummer, 113 N.E. 934, 935 (Ill. 1916)).

[69] *See* LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 96 (Univ. of Wis. Press 1965).

[70] E. ALLAN FARNSWORTH, CONTRACTS 108 (West Academic 4th ed. 2004).

[71] RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. L. INST. 1981).

[72] *Steinberg*, 371 N.E.2d at 639 (citing Milanko v. Jensen, 88 N.E.2d 857, 859 (Ill. 1949); Geary v. Great Atl. & Pac. Tea Co., 10 N.E.2d 350, 351 (Ill. 1937); Dick v. Halun, 176 N.E., 440, 441 (Ill. 1931); RESTATEMENT (SECOND) OF CONTRACTS §§ 19, 22 (Tent. Draft No.1, 1964); Moehling v. W.E. O'Neil Constr. Co., 170 N.E.2d 100, 106 (Ill. 1960); Green v. Ashland Sixty-Third State Bank, 178 N.E. 468, 471 (Ill. 1931)).

demonstrates intent[73] to form a contract from which rights and obligations may be enforced. By definition, enforceability naturally intuits compelling observation or accountability, which easily passes as a synonym for the term "binding."

Furthermore, the contract formation process can be qualified as creating either a bilateral or a unilateral contract. A bilateral contract is a promise made in exchange for a return promise, while a unilateral contract is a promise made in exchange for performance.[74] While the trend in contract law is to minimize[75] the distinction between the two in favor of general formation rules, drawing a distinction may prove helpful in determining whether mutual obligations have been undertaken.[76] A review of the ample case law focusing on student-college contracts reflects that:

> [F]ew courts or scholars explicitly characterize the student-school contract as either unilateral or bilateral. At first glance the contract may appear bilateral; the school promises to provide the curriculum and to award a degree upon the student's satisfactory completion of the academic program, and the student promises

[73] *See* SkyCom Corp. v. Telstar Corp., 813 F.2d 810, 814–15 (7th Cir. 1987) ("Like most other states, Wisconsin takes an objective view of 'intent.' 'The intent of the parties [to be bound] must necessarily be derived from a consideration of their words, written and oral, and their actions.'") (citing Household Util., Inc. v. Andrews Co., 236 N.W.2d 663, 669 (Wis. 1976)).

> Secret hopes and wishes count for nothing. The status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves. It is therefore unimportant whether Walters expected this letter to be the definitive agreement; the binding force of the document depends on public or shared expressions. These often will be undisputed, making summary judgment appropriate. Material disputes may remain even under an objective approach to intent, but the recitation that "intent matters" does not on its own call for a trial. The objective approach is an essential ingredient to allowing the parties jointly to control the effect of their document. If unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power.

Id. at 814–815 (internal citations omitted).

[74] RESTATEMENT (FIRST) OF CONTRACTS § 12 (AM. L. INST. 1932) (explaining the difference between bilateral and unilateral contracts by stating "[a] unilateral contract is one in which no promisor receives a promise as consideration for his promise. A bilateral contract is one in which there are mutual promises between two parties to the contract; each party being both a promisor and a promise.").

[75] RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (making no distinction between "bilateral" and "unilateral" contracts).

[76] 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 21, at 52–52 (1963).

> to pay the tuition and to follow the school's rules and regulations.[77]

However, "[m]ost schools . . . do not permit the student to accept the offer of admission with a promise to pay tuition; the student cannot register until tuition is paid."[78] Requiring student action, such as payment of enrollment fees or tuition, creates a unilateral contract. Colleges appear to be focusing less on the type of contractual relationship formed and more on the identification or misidentification of their respective rights and obligations.

Colleges are painting the ED application as binding and allowing prospective students to reach the logical conclusion that a legal relationship has been formed with the application. In reality, the actual moment of contract formation, i.e., the creation of a legal relationship, is somewhat obfuscated. Nothing in the application itself refers to a "contract." Many colleges use language referencing "an agreement" while language specific to a legal contractual relationship is conspicuously missing.[79] In the April 2020 *United States v. NACAC* final judgment, the court noted that "'[a]greement' means any agreement, understanding, pact, contract, or arrangement, formal or informal, oral or written, between two or more persons."[80] Does

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[77] Mark Pettit, Jr., *Modern Unilateral Contracts*, 63 B.U. L. REV. 551, 572–73 (1983) (citing Perretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979) (quoting Eugene L. Kramer, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME L. REV., 174, 183 (1962))).

[78] *Id.* at 573 n.103 ("It could be argued that a student's letter to a school 'accepting' the school's offer of admission and perhaps enclosing a small deposit should be enough to prevent the school from revoking its offer. On the other hand, to conclude that the student by these actions undertakes a legally enforceable obligation to pay tuition seems inconsistent with the expectations of both parties in this era of multiple applications for admission.").

[79] RESTATEMENT (SECOND) OF CONTRACTS § 1 ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty."); *Id.* at cmt. a ("The word 'contract' is often used with meanings different from that given here. It is sometimes used as a synonym for 'agreement or 'bargain'. It may refer to legally ineffective agreements, or wholly executed transactions such as conveyances; it may refer indifferently to the acts of the parties, to a document which evidences those acts, or to the resulting legal relations. In a statute the word may be given still other meanings by context or explicit definition."). The Uniform Commercial Code ("UCC") has chosen to make a distinction between agreement and contract for its purposes of setting out a framework for sales of goods. *See* U.C.C. § 1-201(b)(3) (AM. L. INST. & UNIF. L. COMM'N 2012) (defining an agreement, "as distinguished from 'contract', means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303"); *id.* §1-201(b)(12) (defining a contract "as distinguished from 'agreement', means the total legal obligation that results from the parties' agreement as determined by [the UCC] as supplemented by any other applicable laws").

[80] U.S. v. Nat'l Ass'n for Coll. Admission Counseling, No. 1:19-cv-03706-BAH, 2020 WL 3044153, at *1 (D.C. Cir. Apr. 17, 2020) (using binding language to reference the definition

this open the window to a determination that any "agreement" between a student and college is a contract? The court does not attempt to answer this question; although, the DOJ Antitrust Division's complaint compared the ED application to an exclusive contract.[81] Following the DOJ's assertion, if the ED application is the entry into an "exclusive contract," a student's forbearance of the right to accept other offers of admission in exchange for an ED acceptance would seemingly satisfy the contract law requirement of consideration. This creates an enforceable agreement, albeit only upon acceptance, i.e., positive reception, of the student's application.[82]

In other words, if an ED applicant promises to withdraw all other applications in exchange for an ED decision and they are subsequently accepted, then upon such acceptance the student is bound to follow through. Both parties have bargained for something: notice of early acceptance in exchange for the obligation to attend and withdraw other applications.[83] However, if the ED applicant promises to withdraw all other applications in exchange for an ED decision, and the prospective student's application is subsequently rejected, the promise to withdraw the other applications cannot and will not ever be enforced.[84] These circumstances raise the specter of an illusory or alternative promise that would fail to satisfy the requirement of consideration.[85] The *United States v. NACAC* court does not address the properness of the "exclusive contract" analogy in its final judgment and lacking such, further inquiry is necessary to determine exactly how and when the contractual relationship is formed.

A. Offer

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of the "First-Year Undergraduate Recruiting Rule" by stating that it "means any Rule or Agreement, or part of a Rule or Agreement, including, but not limited to, Section II.B.5 of the Ethics Rules, that restrains any college or university from recruiting or offering enrollment incentives to first-year college applicants on the basis that (a) a particular date has passed; (b) the applicants have either declined admission or not affirmatively indicated that they are still interested in attending that institution; or (c) the applicants have already enrolled in, registered at, declared their intent to enroll in or register at, or submitted contractual deposits to other institutions.").

[81] U.S. v. Nat'l Ass'n for Coll. Admission Counseling; Proposed Final Judgment and Competitive Impact Statement, 85 Fed. Reg. 1329, 1330–31 (Jan. 10, 2020); *see* Complaint at 7–8, U.S. v. Nat'l Ass'n for Coll. Admission Counseling, No. 1:19-cv-03706-BAH, 2020 WL 3044153, at *1 (D.C. Cir. Apr. 17, 2020) ("The Early Decision application plan is akin to an exclusive contract in any other industry. In this case, the student foregoes the opportunity to consider the competitive offers from other institutions in exchange for an early decision on acceptance . . . At base, the only form of payment an institution may provide in exchange for the exclusive contract with an applicant is the early decision itself.").

[82] United States v. National Association for College Admission Counseling; Proposed Final Judgment and Competitive Impact Statement, 85 Fed. Reg. 1329, 1330 (Jan 10, 2020).

[83] *See id.* at 1330–31.

[84] *See id.* at 1331.

[85] RESTATEMENT (SECOND) OF CONTRACTS § 77 (AM. L. INST. 1981).

A contract offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[86] More simply put, an offeror's intent to form a contract manifests through creating an offer that can be accepted by another.[87] An offer is effective and capable of being accepted when the offeree has knowledge of the offer.[88] Thus, offers must be communicated to an offeree, sufficiently clear and definite, so as to be capable of being accepted and manifest the offeror's intent to be bound to a contract.[89] The NACAC *Guide to Ethical Practice in College Admission* includes in its Definitions and Glossary section "offer of admission," which is, unfortunately, less of a definition than stipulation setting forth "[o]fficial offers of admission may be transmitted by mail, electronically, or on official websites."[90] Whether this is actually a definition is less important than the NACAC's tacit acknowledgement that an offer arises when a college offers admission to its academic program.

Contract law further establishes that not every salvo made to an offeree may be qualified as an offer.[91] An offer and acceptance may be part of a lengthy negotiation process, which entails a series of assertions and concessions that are negotiated and refined into an eventual offer that is capable of being accepted.[92] The contract formation process may also require examination of a conditional offer or a seeming offer that is actually an entreaty to solicit an offer.[93] Consider our hypothetical students once more. If their ED applications are not offers, would these applications qualify as promises or conditional offers? If either, can they result in enforceable contracts? Furthermore, by pinpointing who made the offer to whom, Thomas and Jake have a clear understanding of whether they are each the offeror or offeree. By determining these roles in the contract process, Thomas and Jake are each one step closer to understanding whether they are legally bound under the ED application.

B. Conditional Offer

A conditional offer is an offer that is contingent upon the agreement

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[86] *Id.* § 24 (AM. L. INST. 1981).
[87] *See id.*
[88] *See id.* at cmt. b.
[89] *See id.*; RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. L. INST. 1981) ("(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."); U.C.C. § 2-204(1) (1989) (official comment) ("The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement.").
[90] *Guide to Ethical Practice in College Admission, supra* note 6, at 13.
[91] RESTATEMENT (SECOND) OF CONTRACTS § 24 cmt. a.
[92] *See id.* § 26.
[93] *See id.* § 59; *see also infra* Part III.B.

of the other party to the terms set forth in the offer.[94] Conditions in an offer of acceptance for admission to colleges are fairly common and largely require a student to maintain certain academic standards and comply with codes of conduct and honor codes. When a college accepts a student's ED application, essentially an offer of admission, the condition must be present in the offer—i.e., notice that the student must withdraw all remaining college applications and commit to attend the school that extended to admission offer. A review of language found in offers of admission under the ED application process includes:

> Our offer of early admission is made with the expectation that you will maintain the level of academic and personal excellence that characterized your candidacy. Accordingly, we will carefully review your performance during the remainder of your senior year, and we ask that your mid-year and final grades be forwarded to the Office of Admissions . . . . Under the binding terms of our Early Decision plan, *please withdraw* any applications you may have filed with other colleges and do not initiate any new ones.[95]

This conditional offer of acceptance places an "expectation" on continued academic success and requests the student to "please withdraw" other outstanding applications. While mention is made to the ED plan, no clear conditional language ties the offer for admission to compliance with the request to withdraw any other applications. A sample ED offer of admission letter from Northwestern University includes:

> At this time, *you will need to withdraw all applications you may have submitted to other institutions, as indicated in the Early Decision agreement you signed*. Please note that our offer of admission *is contingent upon* the successful completion of your senior year and a review of your mid-year and final transcripts.[96]

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[94] *See* Hajjar-Nejad v. George Wash. Univ., 873 F. Supp. 2d 1, 3 (D.C. 2012) (explaining that Hajjar-Nejad applied and was accepted to George Washington University Medical School with a conditional offer, and stated, "I understand that the submission of false or misleading information or material omission in connection with the application process shall be grounds for withdrawing my conditional offer of acceptance to [the Medical School]. I further understand and agree that if any such submissions or omissions are discovered after matriculation in the Doctor of Medicine degree program or award of a degree, [the Medical School] has the right, in its sole discretion, to dismiss me from [the Medical School] and/or revoke my degree.").

[95] *Acceptance Letters 2019-2020,* SOLOMON ADMISSIONS CONSULTING, https://www.solomonadmissions.com/acceptance-letters-2019-2020?lightbox=dataItem-k92zcmgs [https://perma.cc/M9UL-LJ7L] (quoting the Dartmouth Sample Acceptance Letter) (emphasis added).

[96] *Northwestern University Acceptance Letter 2019-2020*, SOLOMON ADMISSIONS CONSULTING, https://www.solomonadmissions.com/acceptance-letters-2019-2020?lightbox=dataItem-k92zcmbj [https://perma.cc/W85U-QYBY] (emphasis added).

Once again, the ED offer of admission clearly informs the admitted student that the offer is conditional; however, the condition or contingency is unequivocally tied to continued academic success. By specifically using contingent language in one sentence and softer language in another paired with the phrase, "you will need to withdraw," it is logical to interpret the drafter's intent to bind the student to continued academic excellence while stopping short of extending the conditional nature of the offer to the withdrawal of other applications.[97]

Furthermore, an offer of admission from an ED application to Duke University explains to the newly admitted student:

> You do need to complete some steps to secure your place in the Class of 2024. Click on the "Respond to Offer" tab in the online portal, and follow the listed instruction to accept our offer . . . And if you have already applied to other colleges, *you must withdraw your application from each individual school immediately* . . . . Please remember—we expect you to maintain high standards of academic performance and personal behavior in and out of school, which includes abiding by our Community Standard. If there is any change in your application—including academic, personal, disciplinary, or legal matters—you must contact me directly within 72 hours. We reserve the right to withdraw our offer of admission should your standing in any of these areas change, or if you do not meet the terms of the Community Standard, between now and the beginning of our fall term.[98]

This offer of admission uses the strongest language yet with the choice of "must" in its notice to the newly admitted student to withdraw other applications. A plain language interpretation of the offer as a whole supports the conclusion that this offer of admission is conditional. However, while the use of "must" is an imperative, there is room for argument that the conditional nature of the acceptance is limited to continued level of academic performance, personal conduct, and compliance with the

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[97] *See* Caminetti v. U.S., 242 U.S. 470 (1917) (noting that the canon of construction *Noscitur a Sociis* stands for the premise that in the face of an unclear or ambiguous term, the meaning will be determined by looking at the terms and language that surround it); *see also* Hill v. Conway, 463 A.2d 232, 233 (Vt. 1983); RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. L. INST. 1981) (explaining the Plain Meaning Rule—the rule of construction—holding that if the meaning of a term is plain on its face, then a court must enforce the provision as it is written. A court will presume that, barring evidence to the contrary, parties to an agreement intended for the ordinary and plain meaning of a term to apply).

[98] *Duke University Acceptance Letter 2019-2020*, SOLOMON ADMISSIONS CONSULTING, https://www.solomonadmissions.com/acceptance-letters-2019-2020?lightbox=dataItem-k92zcmcc [https://perma.cc/35CC-97HL] (emphasis added).

Community Standard and does not encompass the withdrawal of other outstanding applications.

Had Thomas or Jake received one of these letters, either one of them would certainly have understood that their college admission was conditional on continued academic success. Whether they could have parsed the difference between the actual express conditions of admission and the request to "please withdraw any other applications," the statement of future action—"you will need to withdraw," or the imperative "you must withdraw," requires a level of linguistic and legal interpretation that is incompatible with their ages and current level of education.

Furthermore, private college admissions consulting companies do little to help clarify the situation. Laurie Kopp Weingarten, president and chief educational consultant at One-Stop College Counseling, has commented that "[students] entered into a contract stating if the school admits them, they will come. They knew the ramifications, and the school accepted them under the premise that they would attend."[99] With experts in the field of college admissions taking strong positions that parrot those of the colleges,[100] the ability to see through real versus imagined contractual obligations becomes ever more formidable for Thomas and Jake. Nonetheless, accepting the premise that a conditional contract is created, if the condition is satisfied, i.e., the student is admitted, the student's obligation to attend becomes operative and enforceable. However, this stance presumes that the college intended to form a legally binding contract and not merely an honor-based agreement.

C. Invitation to Offer

If a party does not intend to make an offer that is capable of being accepted, and thus form a contract, the party may have merely made an invitation to offer. An invitation to an offer or a mere inquiry fails to rise to the level of an offer and does not vest the recipient (supposed offeree) with the power to accept.[101]

In *Steinberg v. Chicago Medical School*, Robert Steinberg, a prospective medical school student, received a school catalog and submitted an application along with the requisite fee to the Chicago Medical School.[102] Upon his rejection from the program, Steinberg filed a cause of action alleging that his application was not properly evaluated according to the school's academic criteria.[103] The *Steinberg* court began its analysis of

[99] Katherine Martinelli, *What Happens If You Get in Early Decision but Change Your Mind?*, COLLEGECOVERED, https://www.collegecovered.com/getting-into-college/backing-out-of-early-decision/ [https://perma.cc/77LA-LCFD].
[100] *Is Early Decision Really Binding, or Can I Still Get Out of It?*, *supra* note 66.
[101] *See* RESTATEMENT (SECOND) OF CONTRACTS § 22 (AM. L. INST. 1981).
[102] Steinberg v. Chi. Med. School, 371 N.E.2d 634, 638 (Ill. 1977).
[103] *Id.*

Steinberg's breach of contract claim by recalling, "[a] contract, by ancient definition, is 'an agreement between competent parties, upon consideration sufficient in law, to do or not to do a particular thing'"[104] before reciting the required elements for contract formation and drawing a parallel between the facts of the case and a merchant contract.[105] Steinberg asserted that a contract was formed through a series of events that began with issuance of the school brochure, which constituted an invitation to offer.[106] Upon receipt of the invitation to offer, "the filing of the applications constituted an offer to have their credentials appraised under the terms described by the defendant, and that the defendant's voluntary reception of the application and fee constituted an acceptance, the final act necessary for the creation of a binding contract."[107]

The *Steinberg* court agreed and treated the brochure as an advertisement, stating that:

> While the advertisement itself is not an offer to contract, it constitutes an invitation to deal on terms described in the advertisement. Although in some cases the advertisement itself may be an offer, usually it constitutes only an invitation to deal on the advertised terms. Only when the *merchant* takes the money is there acceptance of the offer.[108]

Once the court qualified the brochure as an invitation to offer, it found that,

> The tender of the application, as well as the payment of the fee pursuant to the terms of the brochure, was an offer to apply. Acceptance of the application and fee constituted acceptance of an offer to apply under the criteria defendant had established . . . . The application fee was sufficient consideration to support the agreement between the applicant and the school.[109]

The court acknowledged its limited scope of review and posited that the facts support the argument that the parties formed a contract;[110] however, the contract formed was not for the admission of the applicant to the school but rather the contract was for the appraisal of the applicant's eligibility for admission according to the criteria set forth in the brochure.[111]

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[104] *Id.* at 639 (citing People v. Dummer, 274 Ill. 637, 640, 113 N.E. 934, 935 (1916)).
[105] *Id.*
[106] *Id.* at 639.
[107] *Id.*
[108] *Id.* (citations omitted). While the *Steinberg* court cites the role of a "merchant" making an offer, the "school" stands in the merchant's shoes. *See id.*
[109] *Id.*
[110] *Id.* at 640.
[111] *Id.*

D. Acceptance

Acceptance of an offer manifests assent to enter into a contract.[112] An offeree's acceptance of the offeror's offer must meet several requirements. It must be unequivocal and unqualified.[113] If the offeror stipulated a manner of acceptance, the acceptance must be made accordingly.[114] If the offeror does not designate a manner of acceptance, the offeree may accept verbally, in writing, or by any other reasonable behavior or manner under the circumstances.[115] The acceptance of an offer that leads to contract formation allows an applicant or prospective student to assume the role of student.

In the event that a contractual relationship fails to meet the minimum criteria of mutual assent and consideration, may parties be bound ethically, nonetheless? Can Thomas and Jake enter into binding legal contracts with the colleges through the ED application if the colleges never intended to be bound to a legal agreement? Can colleges hold Thomas and Jake morally bound to withdraw their other applications upon acceptance of an ED application for college admission?

E. Intent to be Bound—Contractual or Moral

Intent to be bound manifests through the exchange of an offer and acceptance. Not all offers invite an acceptance that leads to a validly formed contract.[116] Parties may make offers jokingly or in jest,[117] or parties may simply never intend to be bound. "Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract."[118] Colleges admit that no legal contract is formed upon an ED application,[119] but is this admission enough to show that colleges have no intention to form a contract with a prospective student upon the ED application? This admission coupled with evidence or, more precisely, the lack of evidence of colleges enforcing ED applications in court supports the conclusion that colleges never intended to form legal contracts with ED applicants. Colleges have the temerity to assert that the ED

[112] RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. L. INST. 1981).
[113] *See id.* § 50 cmt. a.
[114] *See id.*
[115] *Id.* § 30; *see* Fujimoto v. Rio Grande Pickle Co., 414 F.2d 648, 652 (5th Cir. 1969) ("Where, as here, the offer and surrounding circumstances are silent as to permissible modes of acceptance, the law requires only that there be some clear and unmistakable expression of the offeree's intention to accept.").
[116] *See* Nat'l Bank v. Louisville Trust Co., 67 F.2d 97, 105 (6th Cir. 1933).
[117] *See* Leonard v. Pepsico, 88 F. Supp. 2d 116, 130 (S.D.N.Y. 1999).
[118] RESTATEMENT (SECOND) OF CONTRACTS § 21 (AM. L. INST. 1981).
[119] *See* Alexandra Pannoni, *What Happens to Students Who Back Out of Early Decision Offers*, U.S. NEWS & WORLD REP. (Oct. 24, 2016, 9:00 AM), https://www.usnews.com/education/best-colleges/articles/2016-10-24/what-happens-to-students-who-back-out-of-early-decision-offers [https://perma.cc/DZ8Z-B3NS].

application is binding while lacking any intention to interpret it as anything other than a moral agreement.

Moral agreements are anchored in honor-based or ethical obligations that compel a party to carry out an action or refrain from an action out of a sense of personal conviction.[120] "[O]ne may have a moral obligation to do something, but unless there is also a valid legal obligation, one cannot legitimately be forced by another to do it. A moral obligation is only a legal obligation if it can be enforced by the use or threat of legal force."[121]

The clear rule that a moral or ethical obligation is not legally enforceable without another underlying legal obligation is a rare and welcome find. However, in practice, ethical and moral obligations are often couched in terms of a "gentleman's agreement."[122] A gentleman's agreement is not a helpful tool in converting a moral obligation into a legal obligation. Historically, a gentleman's agreement was a non-legal agreement based upon a man's honor or word.[123] They were often oral agreements that were memorialized with a handshake.[124] Today, gentleman's agreements are either recognized as not legally binding or they are relegated to informal agreements that are either intended to be memorialized in a later contractual manifestation, or the term is used synonymously with letter of intent, memorandum of understanding, or other preliminary agreements.[125] Thus, if a gentleman's agreement is a manifestation of the expression, a man's word is his bond. Does the ED application, which states that a student will withdraw all other applications upon acceptance to the applied-to school, create a non-legally enforceable gentleman's agreement or a legal agreement?

Once again, while colleges and college admission consulting companies publicly perpetuate the fact that the ED application is binding, colleges accept the reality that the ED application does not create a legal

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[120] Van Thompson, *Is a Moral Obligation a Legal Contract?*, CHRON, https://smallbusiness.chron.com/moral-obligation-legal-contract-66668.html [https://perma.cc/XR25-9YA2].

[121] Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 296 (Mar. 1986).

[122] Herbert Bernstein & Joachim Zekoll, *The Gentleman's Agreement in Legal Theory and in Modern Practice: United States*, 46 AM. J. COMP. L. 87, 90 (1998).

[123] *Id.*

[124] *Id.*

[125] *See* Dunhill Sec. Corp. v. Microthermal Applications, 308 F. Supp. 195, 198 (S.D.N.Y. 1969) ("[T]he financial community does not regard [a letter of intent] as a binding agreement, but rather, an expression of tentative intentions of the parties."); *see also* Paramount Brokers, Inc. v. Digital River, Inc., 126 F. Supp. 2d 939, 945 (D. Md. 2000) ("Letters of intent and negotiations ordinarily do not constitute binding contracts and will not be enforced by the courts."); Harris Ominsky, *Counseling the Client on "Gentleman's Agreements,"* 36 PRAC. LAW 25 (1990); Bernstein & Zekoll, *supra* note 125.

obligation.[126] Unfortunately, this acknowledgement that the ED application is merely an honor-bound agreement never finds its way into the college marketing materials or ED application instructions.[127] Nonetheless, cracks in the binding agreement façade are being slowly revealed through news articles and academic volumes that are critical of the ED application:

> If you do get accepted into a college you applied ED, you are bound by an honor code to attend. Remember, you, your parents and even your guidance counselor signed a contract that stated if you were accepted into the college, you would enroll. However, while you did sign an agreement, it is not legally binding, and there will be no legal ramifications if you do reject the offer. The college cannot force you to attend or hold you legally responsible for the tuition and fees associated with attending.[128]

Even leaders in college admissions and enrollment acknowledge the ED application does not create a legally binding contractual relationship.[129] Dave Tobias, vice president of enrollment for Ursinus College in Pennsylvania recognized that "[i]n some ways, early decision is a gentleman's agreement . . . . 'We don't have a lot of ability to do anything on our end to the student.'"[130]

Does this framing of the ED application as a moral or ethical obligation help Thomas and Jake understand the limits of their respective autonomy under an ED application? Probably not. Conflating a moral obligation with a legal obligation does nothing to dispel the reality that until a companion legal obligation exists, a court will not enforce a binding moral obligation.[131] Furthermore, Thomas and Jake only become aware of this interpretation of the ED application after performing due diligence on the ED application process. If Thomas and Jake had no reason to believe they would need to investigate the true consequences of the ED application, it is unlikely they will discover the truth about the binding nature of the ED application. Thomas and Jake reasonably believe the college admissions officers and high school counselors that "binding" means binding, and they are

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[126] *See Early Decision & Early Action*, *supra* note 54; *see generally* David Mainero, *Breaking an Early Decision Agreement: What Happens?*, INGENIUS PREP (Dec. 20, 2017), https://ingeniusprep.com/blog/early-decision-agreement/ [https://perma.cc/JWL8-9BVB].

[127] *See* Kristen Moon, *Can Student's Get Out of ED?*, FORBES (Dec. 14, 2018, 5:00 AM), https://www.forbes.com/sites/kristenmoon/2018/12/14/can-students-get-out-of-ed/?sh=1d07ffaf584d [https://perma.cc/GV8K-5YNE].

[128] *Id.*

[129] Dan Rosenheck, *Harvard May Ignore Early Decision*, HARV. CRIMSON (June 6, 2002), https://www.thecrimson.com/article/2002/6/6/harvard-may-ignore-early-decision-as/ [https://perma.cc/VQ8M-GQPW]; *see* Martinelli, *supra* note 102.

[130] Pannoni, *supra* note 122.

[131] Barnett, *supra,* note 124, at 296 (citing Dale Nance, *Legal Theory and the Pivotal Role of the Concept of Coercion*, 57 U. COLO. L. REV. 1 (1985)).

contractually bound under the ED application. Therefore, if Thomas and Jake accept the premise that they will be entering into a legal relationship with a college, relying on established legal principles and case law, can we hypothesize how the ED application will fit into the contract formation paradigm?

IV. HISTORY OF STUDENT-COLLEGE CONTRACT

A. *In Loco Parentis*

Courts have long recognized the existence of contractual relationships between students and college institutions under the doctrine of *in loco parentis*.[132] In *Gott v. Berea College*, the college amended its student manual to prohibit students from patronizing forbidden locations, such as places of ill repute, liquor saloons, gambling houses, and eating houses not controlled by the college.[133] Gott, the owner of a nearby restaurant, suffered economic losses when students refrained from patronizing it upon pain of expulsion from the college.[134] Gott sought an injunction against the school's enforcement of the new rule.[135] In affirming the lower court's decision for Berea College, the court noted that "[c]ollege authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils."[136] Legally speaking, parents entrusted colleges with the welfare

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[132] In this context, the school acts *in loco parentis* (in the place of the parents). Gott v. Berea Coll., 161 S.W. 204, 206 (Ky. 1913).

> College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, *they* may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.

Id. (emphasis added). *See* Brian Jackson, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1136 (1991) ("College authorities stood in the place of parents to the students entrusted to their care."); *id.* at 1144 ("[I]n its early stages the *in loco parentis* doctrine was a delegation of authority designed for the special circumstances of the tutor-pupil relationship."); Michael P. Germano, *Student Rights: The Contract of Enrollment*, 3 J. JUV. L. 62, 76 (1979) ("The teacher or school official, under this doctrine, is able to exercise essentially the same authority over the child as would the parent in similar circumstances.").

[133] *Gott*, 161 S.W. at 205.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 206 (emphasis added); *see* Theodore C. Stamatakos, *The Doctrine of* In Loco

and education of their children and often entered into express agreements memorializing such.[137] Many of these contracts between the parents and the colleges manifested through the written enrollment agreements and were treated as commercial or service agreements.[138] However, over the years the proliferation of higher education institutions and evolving contractual relationships have shifted the contractual relationship from parent-college to student-college and brought into focus the possibility of implied student-college contracts.[139]

B. Express Versus Implied Student-College Contract

With the historical acknowledgment that students enrolled in college programs have a contractual relationship, widespread use of express contracts has waned in recent years.[140] Today, when courts have struggled to identify an express student-college contract, they have implied one:

> [s]ince a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication.[141]

In *Anthony v. Syracuse University*, Beatrice Anthony sued Syracuse University for improper dismissal.[142] During the course of Anthony's tenure at Syracuse University, she signed registration cards meant to "safeguard those ideals of scholarship and that moral atmosphere" as an admitted student, and Syracuse determined that she had not conducted herself as "a typical Syracuse girl,"[143] resulting in her expulsion from the school. Anthony sued seeking readmission, ultimately leading to the court's determination that while "the relation between plaintiff and defendant was wholly contractual,"[144] the terms of their contract were that of an implied contract

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Parentis*, Tort Liability and the Student-College Relationship*, 65 IND. L. J. 471, 473–74 (1990).

[137] *See* Stamatakos, *supra* note 139, at 471.

[138] Germano*, supra*, note 135, at 79; *see* Anthony G. Covatta, *Colleges and Universities – Contracts – Class Actions – A Medical School's Failure to Evaluate Duly Filed Admission Applications by the Criteria It Has Published Gives Rise to an Action for Breach of Contract Maintainable as a Class Action*, 47 U. CIN. L. REV. 309, 311 (1978) ("Until the early 1900's, the student-college relationship, as colored by the *in loco parentis* doctrine, found expression in a written contract between college and parent.").

[139] *See* Jonathon Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L. J. 253, 253 (1973).

[140] *Id.*

[141] Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981).

[142] Anthony v. Syracuse Univ., 224 A.D. 487, 489 (N.Y. App. Div. 1928).

[143] *Id.* at 488–89.

[144] *Id.* at 490.

with conditions established relating to the student's acceptance.[145] Courts have since continued to rely upon the conduct of the parties and filled in the terms of the student-college contract through various communications, such as college catalogs,[146] bulletins, registration cards, admission applications, dormitory contracts, and brochures.[147]

In 1962, Howard Glenn Carr, a student at St. John's University, a Roman Catholic school, was married in a civil ceremony without conforming to the rituals and requirements of a Catholic marriage.[148] Upon the discovery of such, St. John's University determined that Carr and his witnesses had engaged in "seriously sinful"[149] behavior and were dismissed from the school. The procedural basis for the dismissal was the breach of the university bulletins that set forth "the right to dismiss a student at any time on whatever grounds the University judges advisable."[150] The court, in determining that the bulletins formed a part of the agreement with the students and that the school did not abuse its discretion, held that "[w]hen a student is duly admitted by a private university . . . there is an implied contract between the student and university that, if he complies with the terms prescribed by the university, he will obtain the degree which he sought."[151]

[145] *Id.* at 490–91.
[146] *See* Tex. Mil. Coll. v. Taylor, 275 S.W. 1089, 1091 (Tex. Civ. App. 1925) ("[A] catalogue such as the one in the instant case of an educational institution, when properly circulated and made known to patrons who enter their children under the terms thereof, will constitute a binding written contract.").
[147] *See* Brody v. Finch Univ. of Health Sci., 698 N.E.2d 257, 266 (Ill. App. Ct. 1998) ("[D]ocuments distributed by a school are only a *part* of the contract between the student and the school." (citing Johnson v. Lincoln Christian Coll., 501 N.E.2d 1380, 1383 (Ill. App. Ct. 1986))); *see also* Frederick v. Nw. Univ. Dental Sch., 617 N.E.2d 382, 387 (Ill. App. Ct. 1993) ("A college or university and its students have a contractual relationship, and the terms of the contract are generally set forth in the school's catalogs and bulletins.").
[148] Carr v. St. John's Univ., 17 A.D.2d 632, 633 (N.Y. App. Div. 1962), *aff'd*, 187 N.E.2d 18 (N.Y. 1962).
[149] *Id.*
[150] *Id.* at 634.
[151] *Id.* at 633; *see* Booker v. Grand Rapids Med. Coll., 120 N.W. 589, 591 (Mich. 1909) ("There is no good reason why the law should not recognize, as growing out of these relations, a right of relators resting in contract.").

> Where a student is wrongfully expelled from a college which is maintained by a private corporation of the first class that obtains all its funds from private benefactions and charges made against those who attend its courses and receives no pecuniary aid from the State or the public, and the relation between the student and the college is solely contractual in character, the Court of Common Pleas does not have jurisdiction to issue a writ of mandamus to compel her reinstatement.

In 1972, in *Zumbrun v. University of Southern California*, the court reiterated that "[t]he basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract."[152] Courts have also considered a student's entrance onto campus, the receipt of acknowledgement of a tuition payment, or enrollment as establishing the contract between the parties.[153]

More recently, the court in *Guckenberger v. Boston University* revisited the student-college contract.[154] Prior to the 1995–1996 academic year, Boston University established a program and series of procedures to assist students with learning disabilities.[155] During the year, students who previously qualified for accommodations under the program were notified that new qualification requirements were established.[156] If the students did not comply with the new regulations or were deemed unqualified under the new requirements, no avenue of appeal was available.[157] Students who had been denied accommodations under the new regime and who had been the target of derogatory remarks by the president of the university sued on various claims including breach of contract:[158]

> Plaintiffs allege[d] that BU "published and disseminated various brochures, catalogues, and promotional materials" that described accommodations that students with learning disabilities are eligible to obtain . . . [and] that the promotional materials created a contract between the students with learning disabilities and the university, and that the university breached this agreement.[159]

Barker v. Bryn Mawr Coll. Tr., 1 Pa. D. & C. 383, 396 (D. Pa. 1922); *see* Buchter, *supra* note 142 at 255–57 ("Courts still approach student-university implied contracts by using essentially traditional, early twentieth century contract doctrines. Under such approach, there is 'the implication that the institution had obligated itself—subject, of course, to changes in plan, curriculum, and the like—to permit a student in good standing to continue the particular course for which he has entered upon payment of the necessary fees and compliance with other reasonable requirements. . . . In general, if no specific contract document is signed at the time of application, admission, or registration, entry of the student onto the university campus, or into university life is regarded as the point of formation of the student-university contract.'") (quoting Samson v. Tr. of Columbia Univ., 167 N.Y.S. 202, 204 (N.Y. App. Div. 1917)) (internal citations omitted).

[152] Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972); *see* Guckenberger v. Boston Univ., 957 F. Supp. 306, 317 (D. Mass. 1997) ("Brochures, policy manuals, and other advertisements can form the basis of such contractual agreements.").

[153] Covatta, *supra,* note 141, at 311 n.11–17; *see* Buchter, *supra* note 142, at 257 and accompanying text.

[154] Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997).

[155] *Id.* at 311.

[156] *Id.* at 312.

[157] *Id.*

[158] *Id.* at 311.

[159] *Id.* at 317.

The court, in concluding that the plaintiffs' allegations, if true, supported a breach of contract claim, stated, "Brochures, policy manuals, and other advertisements can form the basis of such contractual agreements."[160]

Author Anthony G. Covatta opines as to whether the student-college relationship should fit within contract law at all and concludes that a bifurcation of the relationship may be made leaving only procedural actions such as "admission, registration and clerical procedures, fashioning and application of disciplinary rules, setting of tuition and fees, notice of change of requirements, and living regulations"[161] to fall within contract law. Acknowledging that students and colleges can and do form legally binding contracts, we return to the issue of whether Thomas and Jake have entered into binding contracts with their colleges through either the ED application or the acceptance process. The significance of the recognition of exactly when a contract is binding continues to propel exploration because it is the moment in which Thomas, Jake, and their respective colleges are vested with all the rights, obligations, defenses, and remedies available under general contract law.

V. FORMATION OF THE ENROLLMENT CONTRACT

Moving away from the *in loco parentis* contract framework, the student-college legal relationship has evolved to the point that it merits its own terminology; "the 'contract of enrollment,' defines the basic relationship between the educational institution and its students in terms of respective rights and obligations."[162] Recognizing a specific contract of enrollment vehicle is a major step toward transparency and understanding of the student-college relationship. By reverse engineering the contract of enrollment, the moments of formation will reveal themselves and allow Thomas and Jake to make informed decisions on whether to utilize the binding ED application process.

[160] *Id.*
[161] Covatta, *supra* note 141, at 316.
[162] Germano, *supra,* note 135, at 78.

A. The College's Application Form Is an Invitation to Offer, the Student's Application Is the Offer, and the College's Admission Is the Acceptance

Courts have held that college admissions brochures, bulletins, and catalogs can form an implied student-college contract.[163] Is it possible, though, that these materials can be construed as mere invitations to an offer or solicitations for an offer of admission? If so, Thomas and Jake as would-be offerors are making an offer to attend the college by way of submitting an application based upon the college's invitation to apply. The college's offer of admission will thus act as the acceptance of the offer that marks the formation of their contractual relationship.

In *Tinkoff v. Northwestern University*, the court took up this issue in its determination of whether Tinkoff had the right to contract with the university.[164] Tinkoff Jr. was fourteen-years-old when he applied for admission to Northwestern University and passed the required entrance examination and satisfied the requirement of successfully completing thirty-six high school credits.[165] Northwestern University denied him admission based upon his age, and his subsequent attempts to be admitted to the university were met with the same fate.[166] Tinkoff sued, seeking to compel the university to admit him.[167] The university argued that its bulletin regulating admissions "expressly stated it was not possible to admit all who met the specific entrance requirements. For the years 1945–1946, the bulletin in addition stated that the University reserved the right to reject any application for any reason it considers adequate."[168] The court stated that:

> Plaintiffs complain Tinkoff, Jr. was denied the right to contract as guaranteed by the Illinois and United States constitutions. We need only say that he had no right to contract with the University. His right to contract for and pursue an education is limited by the right which the University has under its charter. *We see no merit to plaintiff's contention that the rules and regulations were an offer of contract and his compliance therewith and acceptance giving rise to a binding contract. The wording of the bulletin required further action by the University in admitting Tinkoff, Jr. before a contract between them would arise.*[169]

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[163] *See* Texas Mil. Coll. v. Taylor, 275 S.W. 1089, 1091 (Tex. App. 1925) ("[A] catalogue such as the one in the instant case of an educational institution, when properly circulated and made known to patrons who enter their children under the terms thereof, will constitute a binding written contract.").
[164] People *ex rel.* Tinkoff v. Nw. Univ., 77 N.E.2d 345, 347 (Ill. App. Ct. 1947).
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.* at 349.
[169] *Id.* (emphasis added).

This holding supports the argument that the admission criteria within the series of bulletins cannot plausibly form a binding contract—it is not an offer a student can accept. Lacking a qualification as an offer, the admission criteria may be considered an invitation to an offer.[170]

In *Johnson v. Lincoln Christian College*, Gregory Johnson was enrolled in and largely completed a five-year academic program to prepare him for a career teaching sacred music.[171] Upon an allegation that Johnson was homosexual, Lincoln Christian College informed him that he would only graduate if he attended counseling.[172] Johnson, afraid of not graduating, agreed and shared confidential and intimate details of his life with the designated counselor, believing they would be held in confidence.[173] The information was shared with the college, which thereafter informed Johnson he would be dismissed from the college; the reason of "homosexuality" would be stamped across his transcript, and his mother would be notified of his dismissal and the reasons therefore.[174] Johnson filed a breach of contract cause of action against Lincoln Christian College, alleging that the college breached "the terms of a college-student contract . . . implied by law."[175] In determining that Johnson's complaint set forth a valid cause of action for breach of contract, the court held:

> The elements of a traditional contract are present in the implied contract between a college and a student attending that college and are readily discernible. The student's tender of an application constitutes an offer to apply to the college. By "accepting" an applicant to be a student at the college, the college accepts the applicant's offer. Thereafter, the student pays tuition (which obviously constitutes sufficient consideration), attends classes, completes course work, and takes tests.[176]

Based upon *Tinkoff*, college brochures and catalogs may easily be considered invitations to offer. The *Johnson* court sets forth the clear determination that the prospective student's application for admission is an

[170] RESTATEMENT (SECOND) OF CONTRACTS § 26; *see* Steinberg v. Chicago Med. Sch., 371 N.E.2d 634 (Ill. 1977); Lefkowitz v. Great Minneapolis Surplus Store, 251 Minn. 188, 86 N.W.2d 689 (1957).

[171] Johnson v. Lincoln Christian Coll., 501 N.E.2d 1380, 1382 (Ill. App. Ct. 1986); *see* *Twenty-Four Questions on Sacred Music*, CHURCH MUSIC ASS'N AMERICA, https://musicasacra.com/about-cmaa/faq/ [https://perma.cc/VNK6-DFHJ]. "Sacred music" is liturgical music that is created for the purpose of being used as part of a religious service and is "'a necessary and integral part of the solemn liturgy.'" *Id.*

[172] *Johnson,* 501 N.E.2d at 1382.

[173] *Id.*

[174] *Id.*

[175] *Id.* at 1383.

[176] *Id.* at 1384.

offer that is capable of being accepted by the college by way of an offer for admission.[177] Relying on *Tinkoff* and *Johnson*, Thomas' and Jake's ED applications for admission may be qualified as offers for admission. Colleges, by accepting and admitting Thomas and Jake, accept the offers and form student-college enrollment contracts. If their applications were offers, is it possible to discern whether an invitation to offer existed? Is it possible to extend *Tinkoff* to include pre-printed forms provided by the colleges within the definition of invitations to offers? If so, it cannot be overlooked that Thomas and Jake did not create the offers they made to their respective colleges. Their offers take the form of the pre-printed applications provided by the colleges or private entities (e.g., Common App). Thus, Thomas and Jake have not set the terms of their offers—they simply submitted the standard applications, i.e., invitations to an offer, provided by the colleges. The pre-printed forms include the stipulation that the ED process is binding.

An offer requires that the offerors, like Thomas and Jake, intend to be bound by the terms of their offer.[178] Can it be conclusively determined that they intended to be bound to the terms of their offers if they did not know they were in fact the offerors? With alternative application processes, Thomas or Jake could have each chosen a different and non-binding application process to follow. However, under the guidelines provided by NACAC, individual colleges, and high school counselors, students like Thomas and Jake are free to apply to other colleges through non-ED processes contemporaneously with their ED applications to one school. This is counterintuitive to the interpretation that Thomas and Jake are each making a binding offer. If the ED application offer is binding, the students should be foreclosed from making other applications until after a decision, i.e., rejection, is made by the school that they applied to through the ED application process. Furthermore, if the colleges have previously acknowledged that the ED application is, in fact, not legally binding, is it equitable to hold Thomas and Jake liable to the binding agreement when the colleges never intended to be legally bound themselves?

If the term stipulating that the ED application process is binding is found in the invitation to offer, subsequent offer, and eventual acceptance or admission to the college, under this sequence of legal events, Thomas and Jake are bound to the terms of the ED applications and must withdraw their other applications upon acceptance. If Thomas and Jake fail to withdraw their other applications, they have breached their agreements and their respective colleges have the right to enforce the contracts and sue for breach. To date, no college has brought suit against a student who was accepted under the ED application process and failed to withdraw any

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[177] *Id.*

[178] RESTATEMENT (SECOND) OF CONTRACTS § 24 (defining offer as "the manifestation of willingness to enter into a bargain.").

outstanding applications. This marked lack of litigation cannot be ignored and supports a strong inference that a prospective student's offer to the college by way of their ED application for admission does not lead to a binding legal obligation.

B. The Student's Application Is an Invitation to Offer, the College's Admission Is the Offer, and the Student's Enrollment and Fee Deposit Is the Acceptance

In 1892, plaintiff Niedermeyer, a student at the University of Missouri, examined the catalog for the University of Missouri, which stipulated that "[a]pplicants for admission to any of the classes of the law department . . . are required to pay the sum of [$50] for the first year's attendance and [$40] for each successive year."[179] The fee was subsequently increased to $50 in his senior year, and when Niedermeyer attempted to pay the original $40, he was informed his continued enrollment was predicated on the payment of the new amount of $50.[180] Niedermeyer paid the amount and sued to recover the excess $10.[181] In reaching its decision, the court first considered whether the provisions of the school catalog constituted the entire agreement between the parties.[182] The court determined that:

> the catalogue of 1892 and 1893 was by its very terms, a public offer to admit persons as students to any of the classes of the law department of the University, on payment of the sum of $50 for the first year and $40 for each successive year. The plaintiff's payment of $50 and receipt of his matriculation card for the years 1892 and 1893, constituted an implied acceptance and also notice of such acceptance. The contractual relations created between the parties thus became complete and binding.[183]

According to *Niedermeyer*, a contract of enrollment is formed and becomes binding when the school makes a proposition, i.e., an offer and the student pays his tuition and fees.[184] Courts have consistently found the act of payment of tuition upon acceptance of admission creates a binding agreement.[185] "Commentators have defined formation as the point when the student pays the first deposit after receiving an offer of admission, or alternatively the point when the student arrives on campus . . . . Quite

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[179] Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654, 656 (1895).
[180] *Id.* at 656–57.
[181] *Id.* at 657.
[182] *Id.*
[183] *Id.* (citing Society v. Broomfield, 1 N.E. 382 (Ind. 1885)).
[184] *Id.*
[185] Germano, *supra* note 135, at 94*; see, e.g.*, Buchter, *supra,* note 142; Drucker v. N.Y. Univ., 300 N.Y.S.2d 749, 750–51 (N.Y. App. Term 1969); Silver v. Queens Coll. of City Univ., 311 N.Y.S.2d 313, 314 (N.Y. Civ. Ct. 1970).

possibly, registration for classes constitutes the final acceptance."[186] In 1902, in *Goldstein v. New York University,* an expelled student brought suit against the school to allow him to continue his educational studies.[187] In determining whether Goldstein was entitled to an injunction preventing university interference with his studies, the court recognized that students and colleges enjoy a relationship, specifically,

> [t]he relation existing between the university and student is contractual. The plaintiff became a student in the defendant's law school through an invitation contained in a circular issued by the authority of the university, in which it was stated that tuition would be given to law students who were at least eighteen years of age and of good moral character and who would pay to the university the sum of $100 a year. He was accepted as a student.[188] . . . [W]hen a student matriculates under such circumstances, it is a contract between the college and himself.[189]

While the *Goldstein* case reinforces the contractual nature of the student-college relationship, the decision also serves as a reminder to both parties that they should expect to be bound by the initial terms of their agreement that were accepted by both parties.

In *Cazenovia College v. Patterson*, Patterson's daughter was accepted at Cazenovia College, and Patterson paid her tuition deposit to reserve a place in the freshman class.[190] When Patterson's daughter subsequently failed to matriculate and Patterson made no further tuition payments, the college then sued for the balance of Patterson's tuition.[191] Cazenovia College presented Patterson's signed contract containing the terms of the parties' relationship along with the enrollment deposit.[192] Patterson defended his actions, questioning the existence of any contractual relationship.[193] The court disposed of this argument, determining "[i]t was the College's 'acceptance' of defendant daughter's application for admission which constituted the offer, so that defendant accepted the offer when he

[186] Michael Zolandz, *Storming the Ivory Tower: Renewing the Breach of Contract Claim by Students Against Universities,* 69 GEO. WASH. L. REV. 91, 97 n.50 (2000) (citing David Davenport*, The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201, 210 (1985); Kevin P. Mcjessy, *Contract Law: The Proper Framework for Litigating Educational Liability Claims*, 89 NW. U.L. REV. 1768, 1789–90 (1995)).

[187] Goldstein v. N.Y. Univ., 76 A.D. 80 (N.Y. App. Div. 1902).

[188] *Id.* at 82–83.

[189] *Id.* (citing People *ex rel.* Cecil v. Bellevue Hosp. Med. Coll., 14 N.Y.S. 490 (N.Y. Gen. Term 1891)).

[190] Cazenovia Coll. v. Patterson, 360 N.Y.S.2d 84, 86 (N.Y. App. Div. 1974).

[191] *Id.*

[192] *Id.*

[193] *Id.*

subsequently signed it."[194] The court does not expand on its contract formation analysis, and we are left to decipher its matryoshka-like conclusion: the admission application was an invitation to an offer made by Patterson's daughter, the prospective student, and Cazenovia College's acceptance of her application was an offer of admission, which was accepted by Patterson by way of submitting the college contract and tuition deposit.[195]

Applying the reasoning that Thomas' and Jake's ED applications are invitations to offer and the colleges' acceptances for admission were offers, when and if Thomas and Jake matriculate, i.e., enroll and pay any tuition or fees required, they have accepted the offers and formed binding contracts. Under this interpretation of the formation sequence, the ED application cannot be binding because it is not an offer. If the language of the college's acceptance for admission conditions such acceptance on the withdrawal of the other applications, then Thomas and Jake have received conditional offers. Based on an examination of sample admission acceptance letters, they require an interpretative analysis before a conclusion may be made as to whether they actually create conditional offers. Assuming the offers of admission are not conditional, and the binding language appears in the ED application, it does not become part of the actual student-college enrollment contract and thus, cannot be enforced. It bears repeating that, to date, no college has sued a student to enforce an ED application.

C. The College's Early Decision Application Form Is the Offer and the Student's Submission of the Application Is the Acceptance

Accepting the premise that the college makes an offer of admission that a student can accept by enrolling in the college, either a bilateral or unilateral contract is formed. "Most schools, however, do not permit the student to accept the offer of admission with a promise to pay tuition; the student cannot register until tuition is paid. In this situation, the school's offer is an offer for a unilateral contract."[196] Furthermore, logic and history inform us that colleges do not accept all those who apply. If an application is acceptance of an offer that results in a contractual relationship, then all

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[194] *Id.*

[195] *Id.* at 87.

[196] Pettit, *supra* note 80, at 573.

> It could be argued that a student's letter to a school "accepting" the school's offer of admission and perhaps enclosing a small deposit should be enough to prevent the school from revoking its offer. On the other hand, to conclude that the student by these actions undertakes a legally enforceable obligation to pay tuition seems inconsistent with the expectations of both parties in this era of multiple applications for admission.

Id. at 573 n.103.

prospective student applicants must be admitted as students or the college risks breaching its obligations. This is clearly an untenable conclusion that is supported by courts' recognition of the exercise of lawful discretion in evaluating applications.[197]

D. If Early Decision Forms a Binding Agreement, Are There Any Affirmative Defenses Available to the Student Applicant?

Once a student-college enrollment contract has been formed, "[c]ourts apply varying degrees of scrutiny to different categories of contract terms."[198] Additionally, upon the formation of a contract, general contract affirmative defenses[199] against enforceability, or arguments in the face of an interpretation issue, are available to the contracting parties. If a contract of enrollment is expressly created, the included terms will apply along with any implied terms. Courts have found that the contract terms may be implied in a contract based upon college catalogs, manuals,[200] and brochures.[201] An implied contract of enrollment may also be based upon the actions of the parties, i.e., the student's presence on the college campus or payment and acceptance of tuition. Acknowledging the conclusion that the student and college have formed a contract, the implied obligation of good faith and fair

[197] *See* People *ex rel.* Tinkoff v. Nw. Univ., 77 N.E.2d 345, 349 (Ill. App. Ct. 1947) ("Courts have refused to coerce private educational institutions in the exercise of lawful discretion.").

[198] Buchter, *supra* note 142, at 258. Furthermore, courts have recognized student constitutional due process rights in relationships with public institutions while contract law has been the leading legal mechanism that governs relations with private institutions. *See* Eileen K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed,* 7 J.C. & U.L. 191, 199 (1980) ("Since *Dixon v. Alabama State Board of Education,* students at public institutions have been assured substantial procedural protection prior to a dismissal for misconduct. It is doubtful that a court will find state action in a dismissal by a private college, however, and so students at those institutions do not have constitutional protection. . . . private university students could be expected to rely more heavily on contract doctrine to secure procedural rights to notice and hearing before dismissal.") (citations omitted).

[199] See Anthony v. Syracuse Univ., 231 N.Y.S. 435 (N.Y. App. Div. 1928), for a discussion on the Infancy Doctrine; Steinberg v. Chi. Med. Sch., 371 N.E.2d 634, 638 (Ill. 1977), for a discussion on fraud. *See* Buchter, *supra* note 142, at 265 ("[S]ince the institution maintains exclusive control over the drafting of the contract terms, the logic applied to contracts of adhesion could be employed.").

[200] Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (N.Y. App. Term 1996) ("The rights and obligations of the parties, as contained in the university's bulletins and catalogs became a part of the parties' contract.") (citing Vought v. Teachers Coll., 511 N.Y.S.2d 880, 881 (N.Y. App. Div. 1987); Prusack v. State of New York, 498 N.Y.S.2d 455, 456 (N.Y. App. Div. 1986); Auser v. Cornell Univ., 337 N.Y.S.2d 878 (N.Y. Sup. Ct. 1972); Silver v. Queens Coll., 311 N.Y.S.2d 313 (N.Y. Civ. Ct. 1970)); *see also* Holert v. Univ. of Chi., 751 F. Supp. 1294, 1300 (N.D. Ill. 1990) ("[T]he terms of [the relevant] contract are generally set forth in the university's catalogs and manuals.") (citing Wilson v. Ill. Benedictine Coll., 445 N.E.2d 901, 906 (Ill. App. Ct. 1983); Eisele v. Ayers, 381 N.E.2d 21, 26 (Ill. App. Ct. 1978)).

[201] Steinberg v. Chi. Med. Sch., 371 N.E.2d 634 (Ill. 1977).

dealing also attaches.[202]

Author Anthony G. Covatta raises an important distinction relating to the contracting parties themselves by noting that young students often lack sophistication and experience that is necessary when identifying legal relations.[203]

> He [the student] may not realize that in applying for admission to college he is entering a contractual relationship. Even if he understands the consequences of his actions and has the foresight to see that changes in the contract are desirable and bargaining necessary, the process generally takes place under circumstances in which he encounters no one who would have authority to bargain with him. His options frequently limited by geographic and financial considerations, he must "take it or leave it," with the college, his superior in knowledge and resources, often reserving the right to change conditions without notice and even to insulate itself from liability.[204]

Covatta relies on the *Steinberg* court, arguing that it properly addressed this inequitable relationship through the employment of the class action that allowed "otherwise remediless" individual claims to be aggregated.[205]

In the event that Thomas and Jake find themselves in the unenviable position of having been sued for breach of a contract of enrollment due to their failure to withdraw their other applications, they may avail themselves of any defenses that arise by law, such as lack of capacity, fraud, or adhesion contracts. However, taking into consideration the dearth of breach of contract cases in ED applications, the success of any of these affirmative defenses is largely academic.

VI. IF NO BINDING CONTRACT EXISTS, ARE SCHOOLS ENFORCING THE EARLY DECISION APPLICATIONS ANYWAY?

[202] DeMarco v. Univ. of Health Scis./Chi. Med. Sch., 352 N.E.2d 356, 362 (Ill. App. Ct. 1976) ("[A] decision of the school authorities relating to academic qualifications of the students will not be reviewed, but a plaintiff is not without a remedy when it is alleged that a decision to dismiss a student, supposedly for academic deficiencies, was made arbitrarily and capriciously and in bad faith."); *see also* Raethz v. Aurora Univ., 805 N.E.2d 696, 699 (Ill. App. Ct. 2004) ("It is true that a college or university and its students have a contractual relationship, and the terms of the contract are generally set forth in the school's catalogs and bulletins . . . Therefore, in the student-university context, a student may have a remedy for breach of contract when it is alleged that an adverse academic decision has been made concerning the student but *only* if that decision was made *arbitrarily, capriciously, or in bad faith.*") (citing Frederick v. Nw. Univ. Dental Sch., 617 N.E.2d 382 (Ill. App. Ct. 1993)).

[203] *See* Covatta, *supra* note 141, at 314.

[204] *Id.* (citing Van Alstyne, *The Student as University Resident*, 45 DENV. U.L. REV. 582, 583–84 n.1 (1968)).

[205] Covatta, *supra* note 141, at 315.

"A contract between a private institution and a student confers duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced."[206] Assuming Thomas and Jake are legally bound through the ED application process, if they are accepted, they must withdraw their other outstanding applications according to the colleges. If Thomas and Jake fail to do so, the colleges arguably have the right to seek a remedy for breach. If we accept the assumption that the agreement is a legal contract, then the colleges will surely want to sue Thomas and Jake for breach of contract as a demonstration of their seriousness towards the binding nature of the ED application. As repeatedly stated herein, research reflects no case law where a college has chosen to sue an ED applicant for breach of contract. In fact, colleges admit that they do not consider the ED application a legally enforceable contract; rather, they frame it as an ethical or moral contract.[207]

Outside of a contractual relationship, colleges have no legal remedies available against a student who fails to comply with an ethical ED agreement. If colleges acknowledge that no legal agreement is formed with an ED application, they cannot arguably have any expectation interest to protect in the event of non-compliance or breach.[208] While the principles of equity open the possibility of protection of reliance interests or restitution interests,[209] colleges seem more focused on punishing or penalizing student applicants who breach their honor-based ED agreements. As Martin Wilder commented in 2002, a student's ED commitment to a college is an "honor-bound agreement" that "doesn't have any legal standing."[210] Jack Wang, an expert in the related field of financing and payment strategies for college tuition, has stated, "Filing early decision is more morally and ethically binding than legally binding."[211]

The colleges, while lacking enforceable contractual rights, cannot risk doing nothing. The colleges must attempt to enforce the ED application agreements in some measure as a deterrent to future ED applicants. "Early decision, after all, would have no effect if students who were admitted early could costlessly renege on their commitments. Thus, the effectiveness of ED as a means to soften competition for students depends on the threat of mutual enforcement by adopting schools."[212] "The early decision agreement

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[210] *DeMarco*, 352 N.E.2d at 361–62 (citing People *ex rel.* Cecil v. Bellevue Hosp. Med. Coll., 14 N.Y.S. 490 (N.Y. Gen. Term 1891); Balt. Univ. v. Colton, 57 A. 14 (Md. 1904); State *ex rel.* Nelson v. Lincoln Med. Coll., 116 N.W. 294 (Neb. 1908)).
[207] *See* Rosenheck, *supra* note 132; Pannoni, *supra* note 122; Martinelli, *supra* note 102.
[208] *See* RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. L. INST. 1981); *see also* L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54 (1936).
[209] Fuller & Perdue, *supra* note 211, at 54.
[210] Rosenheck, *supra* note 132.
[211] Martinelli, *supra* note 102.
[212] Antecol & Smith, *supra* note 14, at 224.

is not legally binding and the school wouldn't go after the student for tuition, but there could be other consequences."[213] Non-contract-based actions are often taken by the colleges when the accepted ED student does not enroll.

Some colleges simply take the posture of a disappointed parent: "It's just kind of an honor thing, you said you were going to do this. But no, we are not chasing them down."[214] Other consequences range from fairly benign phone calls to determine why an accepted ED student has not enrolled to phone calls to the student's high school counselor or to other colleges that have offered admission to the student.[215] Judith Dobai, the acting director of admissions at Fairfield University, spoke at the May 2001 New England Association for College Admissions Counseling meeting and "[e]xplained that she phoned all Early Decision admits who did not submit a deposit by the January 2001 deadline to remind them of their commitment to enroll."[216] James Fallows, author of *The Early-Decision Racket*, opined about ED decisions, "How is this enforced? Mainly through counselors, who know when a student has been admitted ED and agree not to send official transcripts to other schools."[217]

Some colleges share information with the goal of disqualifying the student from attending another college. In 2016, "Katharine Fretwell, dean of admission and financial aid at Amherst College, . . . [said] her school and about [thirty] other colleges share lists of students admitted through early decision."[218] Andrew Belasco, Ph.D and chief executive officer of College Transitions, also acknowledges that "there are groups of colleges that share lists of early decision acceptances. 'If a student backs out of an agreement and attempts to apply to a college within this group, it is very unlikely that

[213] Pannoni, *supra* note 122.
[214] *Id.*
[215] Moon, *supra* note 130 ("While it isn't his intention to get every college to withdraw their offers of admittance, he does want to make sure the student knows that Carleton College is not happy. However, the bottom line is that an early decision offer is just a gentleman's agreement, and the college can't force you to do anything. While it might seem far-fetched that colleges will communicate with each other, it is a real possibility."); *see* Pannoni, *supra* note 122 ("Occasionally, students back out of early decision agreements without a good reason, says Richard Nesbitt, director of admission at Williams College in Massachusetts. 'It would be a big ethical issue' . . . [i]f, for instance, they found out a student somehow had applied to two different places early decision, or even another early action and the student had broken the early decision agreement, Nesbitt says they'd call the other schools and the student would risk losing both acceptances. . . . Katharine Fretwell . . . says she'd likely also share the names of students who were admitted via early decision, but who are not attending for financial aid and other reasons.").
[216] AVERY ET AL., *supra* note 15, at 57. The authors also recount the experiences of students who received angry phone calls from admissions offices when they failed to withdraw their applications. *Id.*
[217] Fallows, *supra* note 14, at 3; *see* Pannoni, *supra* note 122 ("[H]igh school counselors may stop sending transcripts, letters of recommendation and other necessary admissions materials if a student has applied to a school via early decision until they know the outcome.").
[218] Pannoni, *supra* note 122.

they will be admitted.'"[219]

The authors of *The Early Decision Game* also reference the informal historical enforcement method of sharing "lists of students admitted under Early Decision with the understanding that once admitted to one college they should not be considered subsequently for admission to other colleges."[220] The understanding between the schools is that the other schools will withdraw those students accepted elsewhere from their applicant pools.[221] "Even without legal ramifications, bowing out of an ED acceptance can hurt [a student's] chances of acceptance elsewhere."[222] As such, colleges that have extended admissions offers under ED only to discover the prospective student applied ED to more than one school may even withdraw their offers.

Michele Hernandez, a former assistant director of admissions at Dartmouth and author of *A is for Admission*, explains that colleges do not routinely share student information.

> The only information that is shared among all highly selective colleges is a list of those students accepted early decision or early action, because of the commitment on the student's part to honor the agreement. When Dartmouth finishes its final decisions for the early-decision applicants, it mails a list to the Ivies and several other highly selective colleges . . . so that systems technicians can run the names through the computer and check to see if anyone who is already committed to attending Dartmouth has applied early action or early decision somewhere else. Most of the other colleges would do the same, thereby making sure that students follow the rules.[223]

Dartmouth is far from alone in this practice. As many as fifty colleges engage in sharing ED information.[224] "Early Decision colleges practice this form of reciprocity for self-protection."[225] The authors of *The Early Decision Game* even hypothesize that "[i]t is conceivable that courts would find the sharing of lists of accepted ED applicants to be collusive and illegal. There have been no court cases on this matter, and the legal scholars we consulted disagreed about the legality of the practice."[226]

College Admissions Counselors justify these actions by creating false equivalencies:

Marlyn McGrath Lewis, the director of Harvard's admissions

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[219] Martinelli, *supra* note 102.
[220] AVERY ET AL., *supra* note 15, at 329 n.58.
[221] *See id.*
[222] Martinelli, *supra* note 102.
[223] HERNÁNDEZ, *supra* note 38, at 230.
[224] AVERY ET AL., *supra* note 15*,* at 55.
[225] *Id.*
[226] *Id.* at 335 n.27.

office, explained,

> If we admitted someone and then found out they murdered someone, we probably would rethink that case as well. . . . It is not proper for us to be enforcing or policing other institutions' rules, but we are very concerned about the ethical behavior of students who might be Harvard students.[227]

The idea that a high school senior's college decision-making process should be compared to someone who committed the criminal act of murder is patently problematic and farcical.

Both the NACAC and College Board recommend pressure techniques on high school counselors under the guise of guidelines or helpful resources.[228] The College Board further provides guidance for high school counselors on topics such as "Application Ethics" and "Early Decision & Early Action."[229] The College Board "Application Ethics" resources webpage states that counselors should advise and explain the ethics of the college application process.[230] Generally, the counselors are advised to inform students that "they can't . . . [t]ell more than one college that it's their first choice,"[231] and counselors should:

> Make sure [their] students understand what early decision and early action programs are and what restrictions apply to any early application program they intend to pursue. . . . Early decision programs (and some types of early action programs) are **binding.** If a student applies to a college early decision, that student is agreeing to attend if accepted.[232]

Furthermore, the College Board cites specific NACAC guidance on its website stating,

> "Make sure your students know they can't:"
>
> - Apply to early decision programs at more than one college. Many colleges now ask that counselors sign their

[227] Dan Rosenheck, *Early Decision Policy Clarified*, HARV. CRIMSON (July 26, 2002), https://www.thecrimson.com/article/2002/7/26/early-decision-policy-clarified-after-weeks/ [https://perma.cc/9A7W-7NRZ].
[228] *See* AVERY ET AL., *supra* note 15, at 57–58 (providing that the NACAC thinks a parent and a guidance counselor should be required to sign ED commitments along with students).
[229] *Application Ethics*, COLL. BOARD, https://professionals.collegeboard.org/guidance/applications/ethics [https://perma.cc/GV2M-6JXQ]; *Early Decision & Early Action*, *supra* note 54.
[230] *Application Ethics*, *supra* note 232.
[231] *Id.*
[232] *Id.* (emphasis in original).

students' early decision applications, and NACAC's guidelines bar members from signing more than one per student per application season.

- Fail to withdraw their applications to other colleges after they've been accepted to a college under a binding early decision program. The only acceptable reason not to withdraw other applications immediately is that the student is waiting to hear about financial aid.

- Try to get out of the early decision contract because the student's mind has changed. The only acceptable circumstance under which to break the contract, according to NACAC, is the following: "Should a student who applies for financial aid not be offered an award that makes attendance possible, the student may decline the offer of admission and be released from the Early Decision commitment."[233]

Thus, College Board specifically refers to the ED process as a "contract" that may not be broken, helping promulgate the understanding that the ED application is legally binding.

Currently there is no uniform requirement for high school counselors to sign a student's application. A suggestion that both parents and guidance counselors sign the student's application was rejected at the May 2001 New England Association for College Admissions Counseling meeting. However, the NACAC has "adopted a new guideline for ED in 2001 that included a 'request' for the counselor to sign each ED application to certify that the student understands the nature of the Early Decision commitment."[234]

VII. CONCLUSION

The college admissions process for students is complicated, competitive, and fraught with contractual questions. Young people, like Thomas and Jake, are expected to make life changing decisions based on information provided by ostensibly trustworthy people: high school guidance counselors and college admissions officers. Thomas and Jake know that their chances of being accepted into a favored or top-tier college improve if they apply through the ED application process. They have also been inundated with the concept of a binding ED application throughout the process. Thus, Thomas and Jake justifiably conclude that the ED application process is high risk, high reward. They gain early entry into their college of choice but at the cost of having to withdraw all other applications

[233] *Id.* (citing NACAC's *Statement of Principles*).
[234] AVERY ET AL., *supra* note 15, at 58.

to other colleges. Thomas and Jake are making their decisions based on a false narrative—that the ED application is binding.

The ED application does not create a legally binding relationship. It is merely one step of the contracting process that results in a contractual relationship. A contract of enrollment will eventually result between students and colleges. However, the ED application is either an invitation to offer or an offer. The application, on its own, does not trigger any legal rights or obligations.

Furthermore, colleges readily admit that any relationship created through the ED application process is unlikely to be enforced by colleges. Colleges understand the ED application is an honor-bound agreement between the student applicant and the college. Nonetheless, colleges reserve this interpretation with the complicity of admission counselors, high school counselors, the NACAC, the College Board, and private college admissions companies all while highlighting the binding nature of the ED application. When students do not honor their ED application acceptances, colleges resort to ostensibly penalizing admitted ED applicants in non-contractual ways by relying on pressure tactics and collusive behavior.

The colleges know that these ED applications are not legally binding, but the colleges must maintain that they are, so that the ED application remains an effective and competitive admissions tool. The colleges see no benefit in abiding by the many ethical obligations that they agree to through associations, such as NACAC. The colleges see no hypocrisy or hubris in failing to act ethically and transparently in disclosing their interpretation of "binding" while holding students accountable to moral or ethical ED agreements.

The colleges know that neither Thomas nor Jake created legally binding obligations upon their ED applications. Thomas and Jake are not equally informed. Lacking a clear understanding of the contractual process underpinning the ED application leaves students like Thomas and Jake without all the information necessary to arrive at a determination as to whether the ED application process best suits their goals and whether they have vested any legally enforceable rights or obligations. Thus, Thomas ultimately makes his decision based upon the information he has available, that the ED application is binding. He chooses not to risk being bound to the college and he does not convert his RD application. Jake, who was accepted under a binding ED application, decides that while he has second thoughts about this school, he must withdraw his other applications because he is bound to do so. Both Thomas and Jake may have followed other paths and chosen other colleges had they known what "binding" really means. Unfortunately, Thomas and Jake are only two examples of the many students filing ED applications who have and will continue to face the same dilemmas.