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UNIVERSITY  
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## Vermont Legislative Research Service

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### Affirmative Consent Policies at the Federal, State, and University Levels

The first affirmative consent policy in the United States was introduced at Antioch College (Yellow Springs, OH) in 1991.<sup>1</sup> The policy, titled the Sexual Offense Prevention Policy, was advocated for by students concerned with two sexual assaults which occurred on the small campus of fewer than 200 undergraduate students. While the policy was originally criticized by some media outlets, affirmative consent has since entered mainstream policy discussions and debates.<sup>2</sup> In 2014, California became the first U.S. state to pass a bill mandating affirmative consent in sexual activities. Since the introduction of the California affirmative consent law, New York, Illinois, and Connecticut have also passed bills which require affirmative consent prior to and during sexual activities.

The following report offers an explanation and overview of affirmative consent policies in the United States. Specifically, this report researches affirmative consent at the federal, state, and university levels and examines academic and legal literature both supporting and critiquing enacted and proposed affirmative consent policies.

#### What is Affirmative Consent?

Affirmative consent is different from simple consent. California highlights the major difference in the informal title of their affirmative consent law: “Yes Means Yes.” Per the California law, “affirmative consent means affirmative, conscious, and voluntary agreement to engage in sexual activity.”<sup>3</sup> Affirmative consent policies mandate ongoing, affirmative consent prior to and during sexual activities. Such affirmative consent can be expressed verbally or nonverbally. A lack of resistance is insufficient proof of consent, consent cannot be implied, and consent can

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<sup>1</sup> Kristine Herman, “The History Behind Sexual Consent Policies: Interview with Arun Rath,” *All Things Considered*, National Public Radio, October 5, 2014.

<sup>2</sup> Katie Mettler, “‘No means no’ to ‘yes means yes’: How our language around sexual consent has changed,” *The Washington Post*, February 15, 2018.

<sup>3</sup> H.B. No. 967, Sess. of 2014 (Cal. 2014).

[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

be revoked at any time during a sexual activity. To use a lack of resistance or implied consent as standards for consent would fall under simple consent, also known as “no means no.”<sup>4</sup>

Under current state law, Vermont lacks an affirmative consent policy. Vermont’s sexual assault statute, 13 V.S.A. § 3252, mandates that “no person shall engage in a sexual act with another person and compel the other person to participate in a sexual act without the consent of the other person.”<sup>5</sup> In *Vermont v. Snow* (2013), the Vermont Supreme Court upheld an interpretation of 13 V.S.A. S 3252, which stated that a lack of resistance on its own cannot be considered lawful consent.<sup>6</sup> Nonetheless, this policy does not qualify as an affirmative consent policy because it does not mandate affirmative consent prior to and during sexual activities.

### **Prevalence of Sexual Victimization on College Campuses**

The Association of American Universities (AAU) is a consortium of 62 institutions of higher education (IHEs) in the United States. The organization is considered to be “the preeminent research-intensive group” for American IHEs, as explained North Carolina State University Chancellor William R. Woodson in 2010.<sup>7</sup> In 2017, the AAU published an empirical report based on a survey of students from 27 IHEs. AAU member IHEs commissioned this survey in order to “assess the incidence, prevalence, and characteristics of incidents of sexual assault and misconduct.” The AAU survey “also assessed the overall campus climate with respect to perceptions of risk, knowledge of resources available to victims, and perceived reactions to an incident of sexual assault or misconduct.”<sup>8</sup> The criteria for sexual victimization in the study was nonconsensual penetration and/or nonconsensual sexual touching. It is important to note that the AAU’s results derive from student self-reporting, which could lead to validity problems. Validity problems are inherent in self-reporting, as self-reporters are vulnerable to misremembering, exaggerating, downplaying, or simply being mistaken.<sup>9</sup>

The survey found that 11.0% of undergraduate students at the 27 IHEs surveyed reported sexual victimization during the 2014-15 academic year. In breaking down the results by gender, those with the highest level of self-reported victimization were those who identified as transgender, genderqueer or gender nonconforming, questioning, or not listed (TGQN). Those who identified as women reported the second highest rate of victimization. Among TGQN

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<sup>4</sup> Katie Mettler, “‘No means no’ to ‘yes means yes’: How our language around sexual consent has changed,” *The Washington Post*, February 15, 2018.

<sup>5</sup> 13 V.S.A. § 3252.

<sup>6</sup> *Vermont v. Snow*, 19 A.3d (Vt.2009). <https://law.justia.com/cases/vermont/supreme-court/2013/2012-002.html>.

<sup>7</sup> Paul Fain, “As AAU Admits Georgia Tech to its Exclusive Club, Other Universities Await the Call,” *The Chronicle of Higher Education*, April 21, 2010.

<sup>8</sup> David Cantor, Bonnie Fisher, Susan Chibnall, Reanne Townsend, Hyunshik Lee, Carol Bruce, and Gail Thomas, Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, Rockville, MD: Westat (2017), accessed February 3, 2019, <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf>.

<sup>9</sup> David A. Northrup, “The Problem of the Self-Report in Survey Research,” *Institute for Social Research* 11, no. 3, (1996).

students, 19.0% reported at least one instance of sexual victimization. Among female students, 17.0% reported at least one instance of sexual victimization. Finally, 4.4% of surveyed male students reported at least one instance of sexual victimization. These rates are as high or slightly higher than those revealed in prior surveys conducted by the AAU. The AAU announced on June 18, 2018 that it will commission another survey for the spring of 2019.<sup>10</sup>

### **State Policies: Case Studies of CA, NY, IL, and CT**

#### **California**

In 2014, California became the first state to pass affirmative consent legislation. S.B. 967 adds Section 67386, which relates to student safety, to California's Education Code. Colloquially referred to as the "Yes Means Yes" legislation, it considers "affirmative consent" to have multiple components, with its essence being the "affirmative, conscious, and voluntary agreement to engage in sexual activity."<sup>11</sup> All persons involved in sexual activity are responsible for receiving ongoing affirmative consent, which can be revoked at any time; past sexual encounters between parties or a lack of resistance from an individual do not imply or constitute consent. The state offers a definition of affirmative consent, but it does not explicitly mandate a word-for-word adherence to this definition. Regardless of whether an incident occurs on- or off-campus for IHEs, all students are subject to the policy. According to § 1(a) of the new addition to the Education Code, student financial assistance from the state government is contingent upon an institution's compliance with S.B. 967. Compliance with "Yes Means Yes" means that an IHE must adopt a sexual assault policy that incorporates the elements articulated in paragraphs 1-4 of subsection (a).<sup>12</sup> We list the elements from these paragraphs in Table 1 below.

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<sup>10</sup> Association of American Universities, "AAU Announces 2019 Survey on Sexual Assault and Misconduct", 2018. <https://www.aau.edu/newsroom/press-releases/aau-announces-2019-survey-sexual-assault-and-misconduct>

<sup>11</sup> H.B. No. 967, Sess. of 2014 (Cal. 2014), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

<sup>12</sup> H.B. No. 967, Sess. of 2014 (Cal. 2014), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

Table 1. § (1)(a)(1-4) of Section 67386 in California’s Education Code

<b>Components of policy concerning sexual assault, domestic violence, dating violence, and stalking</b>
An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity.
A standard in which a preponderance of the evidence is used in determining whether the elements of the complaint against the accused have been demonstrated.
Two circumstances under which the accused is responsible for violating affirmative consent policy, relating to the accused: the accused’s belief in affirmative consent arose from their own recklessness or intoxication, the accused did not take reasonable steps to obtain affirmative consent.
Three circumstances under which the accused is responsible for violating affirmative consent policy, relating to the state of the complainant: the complainant was asleep or unconscious, incapacitated due to the influence of substances such as drugs or medication, the complainant was unable to communicate due to a physical or mental condition.

Source: H.B. No. 967, Sess. of 2014 (Cal. 2014), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

On April 7, 2014, the California Senate Appropriations Committee determined that while colleges and universities may “opt not to comply with the federal requirements, and choose to forego federal financial aid participation; they cannot opt out of S.B. 967.”<sup>13</sup> This indicates that the state legislation is compulsory.

To ensure that the policies and protocols implemented by higher education institutions are “detailed and victim-centered,” subsection (b) of the Education Code addition contains 13 paragraphs that must be included in universities’ policies concerning sexual assault, domestic violence, dating violence, and stalking.<sup>14</sup> The 13 elements are detailed in Table 2.

<sup>13</sup> California Legislature. *SB-967 Student safety: sexual assault*, accessed on March 1, 2019, [http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201320140SB967](http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB967).

<sup>14</sup> H.B. No. 967, Sess. of 2014 (Cal. 2014), Accessed on February 14, 2018, [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

Table 2. § (1)(b)(1-13) of Section 67386 in California’s Education Code

<b>Provisions for detailed and victim-centered policies and protocols</b>
Policy statement on confidentiality and how institution will protect privacy of individuals involved
Initial response to incident report includes provisions for assisting the victim, identifying and locating witnesses, and information about the importance of preserving evidence
Response to stranger and non-stranger sexual assault
Development of a victim interview protocol for preliminary and comprehensive follow up victim interviews
Contacting and interviewing the accused
Seeking identification and location of witnesses
Written notification to the victim regarding available on and off-campus resources and services
Participation of victim advocates and other supporting people
Investigating the involvement of alcohol or other drugs
Amnesty for complainant or witness for violation of institution’s student conduct policy at or near the time of the incident, unless violation was egregious
Description of the role of the institutional staff supervision
Comprehensive, trauma-informed training program for campus officials involved in investigating and adjudicating cases
Procedures for confidential reporting by victims and third parties

Source: H.B. No. 967, Sess. of 2014 (Cal. 2014),  
[https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB967](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967).

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Though varying slightly from one institution to another, the definition of affirmative consent from S.B. 967 has been adopted in policies at both private and public institutions of higher education in California. The University of California’s Systemwide Title IX Coordinator issued an

updated “Sexual Violence and Sexual Harassment” policy on January 1, 2016.<sup>15</sup> It applies to all University of California campuses, all university programs and activities, university employees, and students. It lists the four major components of consent – that it is affirmative, conscious, voluntary, and revocable – and enumerates the circumstances under which the complainant would be unable to provide consent. Stanford University, which is a private research institution that receives Cal Grant funding from the California Student Aid Commission, also adheres to the standards set by S.B. 967.<sup>16</sup> In its Administrative Guide,<sup>17</sup> Stanford uses a slight variation on the S.B. 967 definition of consent.<sup>17</sup> The institution’s definition of consent is an “affirmative nonverbal act or verbal statement expressing consent to sexual activity by a person that is informed, freely given and mutually understood.”

## New York

Affirmative consent policies implemented since California’s S.B. 967 are similar in their components, although the language may differ. New York Governor Andrew Cuomo signed the “Enough is Enough” affirmative consent legislation on June 14, 2015.<sup>18</sup> Similar to California’s legislation, H.B. 5965 mandates that Institutions of Higher Education (IHEs) in the state must file a certificate of compliance in order to receive state aid or assistance. Unlike California, New York requires a uniform, state-determined definition for all IHEs to adopt their policies:

Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, if those words or actions create clear permission regarding willingness to engage in the sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant’s sex, sexual orientation, gender identity, or gender expression.<sup>19</sup>

The New York law additionally requires the implementation of an amnesty program on college campuses. This program would protect students who report sexual misconduct from legal action pertaining to alcohol and drug use. Acknowledging that individuals “may be hesitant to report such incidents due to fear of potential consequences for their own conduct,” this

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<sup>15</sup> University of California, *Sexual Violence and Sexual Harassment*, 2016, accessed on February 14, 2019, <https://policy.ucop.edu/doc/4000385/SVSH>.

<sup>16</sup> Stanford University, “Types of Aid,” accessed on February 12, 2019, <https://financialaid.stanford.edu/undergrad/types/index.htm>.

<sup>17</sup> Stanford University, *1.7.3 Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking, Relationship Violence, Violation of University or Court Directives, Student-on-Student Sexual Harassment and Retaliation*, 2016, accessed on February 12, 2019, <https://adminguide.stanford.edu/printpdf/chapter-1/subchapter-7/policy-1-7-3>.

<sup>18</sup> S.B. 5965, 2015–2016 Leg., 238th Reg. Sess. (N.Y. 2015), accessed on February 4, 2019, <https://legislation.nysenate.gov/pdf/bills/2015/S5965>.

<sup>19</sup> S.B. 5965, 2015–2016 Leg., 238th Reg. Sess. (N.Y. 2015).

provision seeks to increase reporting for incidents.<sup>20</sup> Additionally, H.B 5965 creates a “Campus Sexual Assault Victims Unit” within the State Police to respond to these crimes specifically.<sup>21</sup>

## Illinois

Illinois passed an affirmative consent policy, H.B. 821, on August 21, 2015.<sup>22</sup> Named the “Preventing Sexual Violence in Higher Education Act,” this act does not once use the term “affirmative,” though it does include many of the same subsections as California’s affirmative consent legislation. It specifies that consent is ongoing and revocable, and that it cannot be implied from a lack of resistance, manner of dress, or previous sexual relations. It further maintains that affirmative consent cannot be given if an individual is underage, unconscious, or incapacitated due to mental disability or drugs including alcohol.<sup>23</sup> While it is required that institutions’ definitions include these components, H.B. 821 notes that “nothing in this Section prevents a higher education institution from defining consent in a more demanding manner.”<sup>24</sup> The comprehensive policy outlines 11 total components, including the definition of consent, that must be included in institutions’ policies concerning sexual violence, domestic violence, dating violence, and stalking. These components are similar to those required by California’s laws (see Table 2). Unlike California, in which state financial assistance for institutions is contingent upon adherence to its affirmative consent policy, Illinois does not specify a mechanism for accountability. It states only that, “on or before August 1, 2016, all higher education institutions shall adopt a comprehensive policy concerning sexual violence, domestic violence, and stalking consistent with governing federal and State law.”<sup>25</sup>

## Connecticut

Connecticut passed Public Act 16-106 on July 1, 2016.<sup>26</sup> Known as “An Act Concerning Affirmative Consent,” the law defines consent as “an active, clear and voluntary agreement by a person to engage in sexual activity with another person.”<sup>27</sup> In addition to the state definition, the legislation contains the next three components listed in Table 1. Like Illinois, Connecticut does not specify what consequences might result from an institution’s failure to comply with the policy, stating only that “each institution of higher education shall adopt and disclose in such institution's annual uniform campus crime report one or more policies regarding sexual

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<sup>20</sup> S.B. 5965, 2015–2016 Leg., 238th Reg. Sess. (N.Y. 2015).

<sup>21</sup> S.B. 5965, 2015–2016 Leg., 238th Reg. Sess. (N.Y. 2015).

<sup>22</sup> H.B. 821, Sess. of 2015 (Ill. 2015), accessed on February 10, 2019, <http://www.ilga.gov/legislation/99/HB/PDF/09900HB0821lv.pdf>.

<sup>23</sup> H.B. 821, Sess. of 2015 (Ill. 2015), accessed on February 10, 2019, <http://www.ilga.gov/legislation/99/HB/PDF/09900HB0821lv.pdf>.

<sup>24</sup> H.B. 821, Sess. of 2015 (Ill. 2015).

<sup>25</sup> H.B. 821, Sess. of 2015 (Ill. 2015).

<sup>26</sup> H.B. 5376, Sess. of 2016 (Conn. 2016), accessed on February 15, <https://www.cga.ct.gov/2016/ACT/pa/2016PA-00106-R00HB-05376-PA.htm>.

<sup>27</sup> H.B. 5376, Sess. of 2016 (Conn. 2016).

assault, stalking and intimate partner violence.”<sup>28</sup> As seen in other state definitions, Connecticut mandates that consent is revocable and ongoing.

### **Federal Policies Regarding Consent in Education Institutions**

Currently, there is no federal legal definition of affirmative consent. In U.S.C. 10 § 920 Article 120, consent is defined as “freely given agreement to the conduct at issue by a competent person.”<sup>29</sup> The federal government has passed several policies to expand victims’ rights as well as the responsibilities of Institutions of Higher Education (IHEs) in maintaining the equality and safety of students in response to sex discrimination and gender-based violence, such as Title IX (1972), the Clery Act (1990), and the Violence Against Women Act (2014).

#### **Title IX**

In 1972, Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. Â§1681. This amendment explicitly prohibits discrimination on the basis of sex in education programs and activities that receive any federal funding.<sup>30</sup> Title IX is best known for affording women equal access to sports activities. Sexual harassment and violence, however, are also considered forms of gender-based discrimination prohibited under this amendment. All students, faculty, and staff at institutions covered by Title IX are “protected regardless of sex, sexual orientation, gender identity, part- or full- time status, disability, race, or national origin.”<sup>31</sup> Every institution that receives federal funding must have a Title IX coordinator that ensures the institutional compliance with Title IX and that is easily accessible for students, faculty, and staff to file complaints.

On November 30, 2018, Secretary of Education Betsy DeVos proposed changes to Title IX that would “condemn sexual violence and punish those who perpetrate it, while ensuring a fair grievance process.”<sup>32</sup> Under the proposed revisions, sexual harassment will be formally redefined under Title IX using three different definitions. The first is quid pro quo harassment, which is when someone offers something in exchange for a sexual act. Sexual assault as defined in the Clery Act will fall under the definition of sexual harassment under Title IX. Lastly, it will be defined as “unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively

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<sup>28</sup> H.B. 5376, Sess. of 2016 (Conn. 2016).

<sup>29</sup> Rape and sexual assault generally, 10 U.S.C 920: §Art. 120, [http://uscode.house.gov/view.xhtml?req=\(title:10%20section:920%20edition:prelim\)](http://uscode.house.gov/view.xhtml?req=(title:10%20section:920%20edition:prelim)).

<sup>30</sup> U.S. Department of Justice, “Overview of Title IX of the Education Amendments of 1972, 20 USC A§ 1681,” accessed on February 14, 2019, <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq>.

<sup>31</sup> U.S. Department of Education, Office for Civil Rights. *Title IX Resource Guide* (2015), accessed on February 14, 2019, <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

<sup>32</sup> US Department of Education, *Title IX Resource Guide*.

offensive that it effectively denies a person equal access to the school's education program." <sup>33</sup> The proposed revisions also would provide a strengthened "presumption of innocence" for the accused during the adjudication process with the "burden of proof on the school."<sup>34</sup> The public commenting period of sixty days concluded on January 30th, 2019. As of February 2019, there have not been any further Department of Education statements nor actions regarding the proposed changes.

## **Violence Against Women Act of 1994**

The Violence Against Women Act (VAWA) was passed as Title IV of the Violent Crime Control and Law Enforcement Act of 1994.<sup>35</sup> VAWA addresses violent crimes perpetrated more frequently against women, including intimate partner violence, sexual assault, and stalking. In 1995, the Office on the Violence Against Women (OVW) was created by the Department of Justice to oversee allocation of funds authorized under VAWA. The OVW has awarded over \$8.1 billion in grants to "state, tribal, and local governments, nonprofit organizations, and universities" from its creation in 1995 through FY2018.<sup>36</sup> VAWA has been reauthorized by Congress in 2000, 2005, and 2013. As of February 2019, H.R.6545, Violence Against Women Reauthorization Act of 2018 has been introduced and referred to committees.<sup>37</sup> The budget of VAWA is still up for political debate. On campuses of IHEs, VAWA is implemented through the Clery Act. The reauthorization of VAWA in 2013 greatly expanded the responsibilities of IHEs regarding reportable crimes under the Clery Act, which is explained further in the next section.

## **Clery Act**

The Student-Right-to-Know and Campus Security Act was passed in 1990 as an amendment to the Higher Education Act of 1965. In 1998 the act was renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, or Clery Act, in memory of Jeanne Clery, a student who was raped and murdered in her dorm room.<sup>38</sup> The purpose of the Clery Act is to increase transparency regarding crime and safety on campuses of IHEs. In order to receive Title IV financial assistance, IHEs must disclose statistics of all crimes that are reported

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<sup>33</sup> US Department of Education, *US Department of Education Proposed Title IX Regulation Fact Sheet* (2018), accessed on February 15, 2019, <https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf>

<sup>34</sup> US Department of Education, *Proposed Title IX Regulation Fact Sheet*.

<sup>35</sup> Lisa N. Sacco, Congressional Research Service, *The Violence Against Women Act: Overview, Legislation, and Federal Funding*, 2015, accessed on February 15, 2019, <https://fas.org/sgp/crs/misc/R42499.pdf>.

<sup>36</sup> US Department of Justice Office on Violence Against Women, "About the Office," 2019, accessed on February 15, 2019. <https://www.justice.gov/ovw/about-office>.

<sup>37</sup> *Violence Against Women Reauthorization Act of 2018*, HR 6645, 115th Cong., Introduced in House July 26, 2018. <https://www.congress.gov/bill/115th-congress/house-bill/6545/text?format=txt>

<sup>38</sup> Gail McCallion, Congressional Research Service, *History of the Clery Act: Fact Sheet*, (2014), accessed on February 16, 2019, <https://www.hsdl.org/?view&did=759350>.

on or near institutions' campuses as well as IHEs' security policies.<sup>39</sup> Title IV financial assistance is aid that is provided to students through federal loans, grants, and work study programs.<sup>40</sup> In 1992, the Clery Act was amended so that IHEs are required to have policies and procedures in place that protected the rights of sexual assault survivors. The VAWA Reauthorization Act of 2013 expands the crimes that are required to be reported by IHEs to include domestic violence, dating violence, and stalking. Additionally, VAWA expanded the definition of reportable hate crimes under the Clery Act to include crimes motivated by bias against gender identity or national origin.<sup>41</sup>

### **Consent Policies at IHEs in Vermont**

Some institutions of higher education (IHEs) in Vermont have affirmative consent language in their campus policies, although there is no state law mandating such language. This section describes the variation between consent policies at Vermont IHEs. For example, the University of Vermont does not have an affirmative consent policy, but Vermont Technical College does.

#### **University of Vermont**

The University of Vermont (UVM) does not have an affirmative consent policy. Under the "Sexual Harassment and Misconduct" policy statement, consent is defined as "a person's willingness to engage in a specific sexual act or form of sexual contact."<sup>42</sup> Consent may be "expressed or it may be inferred from behavior." In UVM's adjudication process, the context of a case is used to determine whether the "respondent knew or reasonably should have known that the complainant did not consent."<sup>43</sup> The policy states that it is the responsibility of the person who wants to engage in the act to ensure that they have received consent.

#### **Middlebury College**

Middlebury College's "Policy Against Sexual Misconduct" defines consent as "words or actions, freely and actively given by each party, which a reasonable person would interpret as a willingness to participate in agreed-upon sexual conduct."<sup>44</sup> A person cannot give "valid" consent if they are incapacitated from drugs or alcohol, intimidation, threats, or physical

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<sup>39</sup> White House Task Force to Protect Students from Sexual Assault, *Intersection of Title IX and the Clery Act* (2014), accessed on February 16, 2019, <https://www.justice.gov/archives/ovw/page/file/910306/download>.

<sup>40</sup> Federal Student Aid Office, "Title IV Program Reports, 2019, accessed on February 15, 2019, <https://studentaid.ed.gov/sa/about/data-center/student/title-iv>.

<sup>41</sup> Gail McCallion, Congressional Research Service, *History of the Clery Act*.

<sup>42</sup> University of Vermont, "Sexual Harassment and Misconduct," (2016), accessed on February 12, 2019, [http://www.uvm.edu/policies/general\\_html/sexharass.pdf](http://www.uvm.edu/policies/general_html/sexharass.pdf).

<sup>43</sup> University of Vermont, "Sexual Harassment and Misconduct."

<sup>44</sup> Middlebury College, "Policy Against Sexual Misconduct, Domestic and Dating Violence and Stalking," (2018), accessed February 12, 2019, <http://www.middlebury.edu/about/handbook/policies-for-all/non-discrim-policies/smdvs>.

violence are used, or if the person has a physical or mental condition that prevents the person from being able to give consent.

### **Saint Michael's College**

Under Saint Michael's College's (SMC) "Sexual Harassment, Sexual Misconduct, Domestic Violence, Dating Violence, and Stalking Policy," consent must be informed, voluntary, and clearly established. A person's ability to give or withhold consent can be impaired by the consumption of drugs or alcohol, if the person is asleep or unconscious, or if the person has a physical or mental incapacity. In the policy, it is stated that, "ignorance of the policy noted above, or the intoxication of the respondent, will be in no way considered an excuse for violating the policy."<sup>45</sup> The language used in SMC's consent policy is very similar to that of California's state law and can be considered an affirmative consent policy despite the absence of the word "affirmative."

### **Vermont Technical College**

Although Vermont Technical College (VTC) does not use the word "affirmative" in their consent definition, they have an affirmative consent policy based on the components seen in California's law. Their policy describes "effective" consent as "knowing and voluntary agreement to engage in a mutually-agreed upon sexual activity."<sup>46</sup> Under their policy, consent for one activity does not imply consent for another, and a prior sexual or dating relationship does not imply consent. Consent cannot be gained through, "threat, force, or coercion," or if a person is incapacitated by drugs or alcohol or has a physical or mental condition which prevents them from giving consent.

## **Research on Affirmative Consent**

Due to the novelty of affirmative consent policies and legislation, quantitative research and studies on these policies is extremely limited. Most of the academic work on affirmative consent can be found in law review articles which present arguments based on legal and theoretical frameworks. Some lawyers support affirmative consent on the basis of these policies representing a societal shift in the perception of sexual activities to become more

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<sup>45</sup> Saint Michael's College, "Student Code of Conduct and College Policies," 2018, accessed on February 12, 2019, <https://www.smcvt.edu/-/media/files/offices/studentlife/20172018%20saint%20michaels%20college%20student%20code%20of%20conduct%2010%206%2017.ashx?la=en>.

<sup>46</sup> Vermont Technical College, "Clery Act Crimes," (2018), accessed February 24, 2019, <http://www.vtc.edu/sites/default/files/wysiwyg/PDFs/Policies/VSC%20Policy%20311-A%20and%20Implementing%20Procedures%20%28revised%20effective%208-9-16%29.pdf>.

egalitarian.<sup>47</sup> Other lawyers object to affirmative consent policies, asserting that sexual assault cases should be handled by the criminal justice system rather than IHE adjudication systems.<sup>48</sup> It is important to note that these conclusions have not been reached through empirical methods. Quantitative research and studies are beginning to enter the peer-reviewed literature, however, as seen below.

Sociologists from the University of Georgia conclude in a 2018 *Journal of Interpersonal Violence* article that affirmative consent policies undermine the goals of those policies by reinforcing traditional gender roles.<sup>49</sup> The sociologists tested their hypotheses through a laboratory experiment where they presented an equal number of male and female undergraduates two types of affirmative consent policies; one framed in terms of punishment, the other in terms of normative morality. The sociologists found that affirmative consent policies, when framed in terms of punishment rather than morality, increased undergraduate men's support for the policy, had no effect on their likelihood to comply, and increased their perception that "most people" hold men to be more powerful than women. The normative morality framing had no effect on the men's likelihood to comply and decreased the women's likelihood to comply.

## Conclusion

As of February 2019, there is no affirmative consent standard at the federal level. Several states have adopted affirmative consent policies of their own, with those being California, New York, Connecticut, and Illinois. The California and New York legislation directly ties compliance to state-funded student financial assistance, creating a mechanism for accountability. In those four states and others, IHEs have taken steps to include affirmative consent language in their bylaws and codes of conduct. While Vermont does not have an affirmative consent policy, some institutions within the state, such as Vermont Technical College, have adopted affirmative consent language in their sexual assault policies.

Empirical research on affirmative consent policies is limited. The one study published points to concerns regarding the framing of affirmative consent policies and heteronormative gender perceptions. In the conclusion of their article, the University of Georgia sociologists express that more empirical research is needed on affirmative consent policy implementation, enforcement, and how bystander intervention impacts gender beliefs and biases.<sup>50</sup>

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<sup>47</sup> Nicholas J. Little, "From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law," *Vanderbilt Law Review* 58, no. 4 (May 2005): 1321-1364.

<sup>48</sup> Blair A. Baker, "When Campus Sexual Assault Policies Violate Due Process Rights," *Cornell Journal of Law and Public Policy* 26, no. 533, 2018. Accessed February 17, 2019. <https://www.lawschool.cornell.edu/research/JLPP/upload/Baker-final.pdf>.

<sup>49</sup> Tinkler, Justine E., Jody Clay-Warner, and Malissa Alinor, "Communicating About Affirmative Consent: How the Threat of Punishment Affects Policy Support and Gender Stereotypes," *Journal of Interpersonal Violence* 33, no. 21, (2018), accessed on February 17, 2019. doi:10.1177/0886260518798356.

<sup>50</sup> Tinkler et al., "Communicating About Affirmative Consent."

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