

The background of the top half of the cover features a soft, reddish-pink illustration of several butterflies with striped wings resting on large, veined leaves. The overall tone is gentle and natural.

Indigenous Women's Reproductive Justice

*After Roe: Abortion Rights and
Indigenous Body Sovereignty
in South Dakota*

NATIVE AMERICAN WOMEN'S HEALTH
EDUCATION RESOURCE CENTER

JULY 2023



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INTRODUCTION BY CHARON ASETOYER

The Native American Women's Health Education Resource Center has been the leading organization in Indigenous women's reproductive justice work over the past 37 years. We organize Indigenous people locally, nationally and internationally to address reproductive justice issues through a human right lens, addressing such issues as forced sterilization, contraceptive abuses, the increase in cesarean births, lack of breastfeeding education, Fetal Alcohol Syndrome and the denial of abortion services due to the Hyde Amendment.

Prior to contact with the Europeans, Indigenous women received their health care from traditional midwives and medicine women (women knowledgeable of herbs) for their health care needs. When Indigenous Nations were confined to reservation lands, restrictions were imposed on a lot of our traditional practices by the Colonial Government, usually not imposing the same restrictions on the settlers. They tried everything to destroy our traditional health care practices, even to the point of threatening our midwives with jail if they did not stop delivering children and providing health care and demanding that our pregnant people go into town for their deliveries, regardless of the distance they had to travel.

As the churches moved in with their foreign teachings, they created even more difficulty for our midwives to provide their services to our women. Many of our traditional practices were forced underground. Families that lived farthest from town and had less contact with colonial institutions continued to practice our ways. As time went on,

more and more methods of separating us from our families and traditional practices occurred. Boarding schools were imposed on our children, taking them from the home and interrupting the natural flow of knowledge from parent to child. They prevented our children from speaking our languages, often separating siblings and imposing Christianity as another way of converting to main-stream society.

Over the past forty years, the NAWHERC has worked to organize Indigenous women to preserve our traditional knowledge and practices concerning reproductive health. Indigenous women

from many Nations have gathered to identify priority issues and develop the "Indigenous Women's Reproductive Justice Agenda". Approximately every ten years the NAWHERC convenes for the purpose of updating and expanding the identified issues and traditional knowledge of the agenda. From the first time we convened, pregnancy termination/abortion was identified within the agenda.

The practice of pregnancy termination/abortion was the decision of pregnant people and not questioned by their partners, nor was it discussed in the political arena. The decision of the pregnant person was respected.

In the United States of America, abortion has been used to control political agendas and used as a political weapon, causing pregnant people to go underground when seeking services. Since the decision to overturn *Roe v. Wade* in 2022, South Dakota has had one of the most restrictive anti-abortion laws in the United States.

This report will elaborate on South Dakota's anti-abortion, anti-women law, and how it actually puts lives at risk. It will examine the impact of the rollback of abortion services that have impacted the lives of Indigenous people here in South Dakota and beyond since the Supreme Court's decision in the *Dobbs v. Jackson Women's Health Organization* resulted in the overturn of *Roe v. Wade*.

These decisions prevent Native people from receiving reproductive health services which is a violation of our human rights. Health care is not a privilege, it is a human right.

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BACKGROUND

Native Americans represent a group with a distinct economic, geographic, and cultural population within South Dakota, causing distinct differences in abortion and reproductive healthcare access. In South Dakota, 49% of Native Americans live below the federal poverty line, compared to 12.3% of the general populationⁱ. The employment rate for Native Americans in South Dakota is 54.8%, compared to 87.5% of white people in the stateⁱⁱ, the widest divide seen anywhere in the United States. On reservations, this rate is even lower at 41.1%, with some reservations experiencing significantly lower rates, such as the Pine Ridge Reservation, where employment rates hover around 36%ⁱⁱⁱ. Additionally, more than 80% of Native Americans in South Dakota live in rural areas, compared to 43% of the state's population^{iv}. As a result, it is very difficult for Native Americans to travel and afford necessary reproductive care. Access was already a challenge even before statewide abortion bans, but having to travel out of state to receive an abortion makes this right all the more inaccessible for Native Americans. Native Americans have a long history of birth control and termination, and bodily autonomy has always been a key part of traditional culture.

Any attempt to restrict abortion access for Indigenous Americans via the implementation of abortion bans, undue economic hardship, or other impediments constitutes a severe economic and human rights violation. This report will examine the history of abortion in South Dakota, Native American abortion and termination traditions, and the disproportionate human rights and financial effects on Native Americans of the abortion bans

instituted in South Dakota in the wake of the Supreme Court overturning *Roe vs. Wade* in the *Dobbs vs. Jackson Women's Health Organization*.




Legal History of Abortion in South Dakota

In 1973, the Supreme Court handed down their landmark decision in the case of *Roe vs. Wade*, finding that the due process clause of the 14th amendment includes the right to privacy between doctor and patient when discussing and performing abortions and terminations. In the majority for this decision, Justice Blackmun stated that:

.....
“ For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.”^v
.....

Second trimester abortions could be subject to some restrictions, but in *Planned Parenthood v. Casey*, the court further strengthened the right to abortion during the second trimester by focusing on a viability approach as opposed to trimesters^{vi}. While this statute remained in effect until the decision in *Dobbs vs. Jackson Women's*



Health Organization overturned this ruling (as well as *Planned Parenthood v. Casey*), the conservative faction of South Dakota's state government still attempted to ban and restrict abortion. Under the "undue burden" test established in *Planned Parenthood v. Casey*, some of the laws were allowed to remain in place^{vii}. This undue burden test however, never took into account the different situations people found themselves in. Native Americans, especially those living on reservations, experience a larger burden than white people living in a city, even when the restrictions imposed are the same. Any type of restriction based on gestational age also fails to take into account complicating factors such as distance that can make it difficult for AI/AN people to get an abortion in a timely manner, causing more people to be turned away due to gestational age^{viii}.

In 2006 and 2008, South Dakota enacted laws to ban abortion despite the regulations laid out in *Roe v. Wade* and *Planned Parenthood v. Casey*, but both were overturned by ballot initiatives by significant margins (56-44 and 55-45)^{ix}. Since these laws were overturned via ballot initiative, they were never litigated, so their constitutionality before the *Dobbs* decision was never challenged. However, despite no outright ban, restrictions on abortion access were strict. South Dakota required a counseling session at an anti-abortion "crisis pregnancy center," which included misleading information about an increased risk of suicidality following abortions, as well as a 72-hour waiting period, which in 2013 was amended to exclude weekends and holidays. Taking time off to complete these requirements presented an especially large challenge to AI/AN people due to the costs associated with missing work for those employed, as well as child-care costs, and the potential need to make multiple trips. Additionally, "crisis pregnancy centers" are often run by Christian organizations that offer counseling that does not align with Indigenous beliefs, instead imposing damaging Christian opinions that continue to propagate their genocidal settler colonial project^{xii}. In 2019, South Dakota made it illegal for providers to administer medication abortions

by telehealth despite widespread evidence that this is a safe and effective option for many patients^{xiii}. Telehealth abortions could have posed a serious opportunity for people in rural areas, where most Indigenous people live (though the IHS likely would not fill prescriptions for mifepristone and misoprostol), so this ban impacted these populations significantly more than others. These restrictions, along with strong social stigma resulted in significantly lower abortion rates than seen on the national scale.

In 2022, the Supreme Court overturned *Roe vs. Wade* in *Dobbs vs. Jackson Women's Health Organization*. In a 6-3 decision, the court ruled that *Roe vs. Wade* was decided incorrectly, and that the constitution did not provide for a right to abortion via the due process clause of the 14th amendment. Alito's majority decision rested on a textualist interpretation of the constitution, stating that because there was no direct mention of abortion in the constitution, that rights cannot be retroactively interpreted into parts of the constitution that do not mention them directly^{xiv}. A textualist approach to the Constitution perpetuates the colonial ideas that the founding fathers had when they wrote it. During that period, they actively supported the oppression of AI/AN people and traditions, perpetrating



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the forced assimilation and genocide that decimated Native populations. Thus, when Alito tries to understand what they intended to say back in the 18th century, he actively pushes this racist agenda. In his decision, he states that:

.....
"It follows that the States may regulate abortion for legitimate reasons."^{xv}
.....

As a result, many states moved to place stringent restrictions or outright bans on abortion. South Dakota, along with 12 other states had put in place "trigger laws," laws that became active when *Roe v. Wade* was overturned, though some were not actually in place until later that year due to injunctions placed by judges. In South Dakota, the *Dobbs* decision led to the trigger law going into effect. This law states that:


.....
"Any person who performs, procures or advises an abortion other than authorized by chapter 34-23A is guilty of a Class 6 felony."^{xvii}
.....



As of June 14 2022, providing or receiving abortion is illegal in South Dakota. The only exception is if the pregnant person's life is in danger^{xviii}. Even with this exemption, people remain in danger of serious injury or death, as doctors must wait until someone is actively in danger of dying to perform the procedure, even if they know that the person is going to become sick in a life-threatening way. Given that Native Americans are more likely to experience complications and death during pregnancy, these restrictions cause unnecessary pain and suffering for this population in particular^{xix}. There are no exemptions in place for pregnancies caused by rape or incest, an unusual decision, defended by Governor Kristi Noem^{xx}. Given that over half of Native American women report being sexually assaulted in their lifetime, this law once again disproportionately damages Native Americans^{xxi}. These laws make South Dakota a state with some of the most restrictive abortion laws in the United States, as the vast majority have a rape and incest exemption.

Historical Practice of Abortion in SD

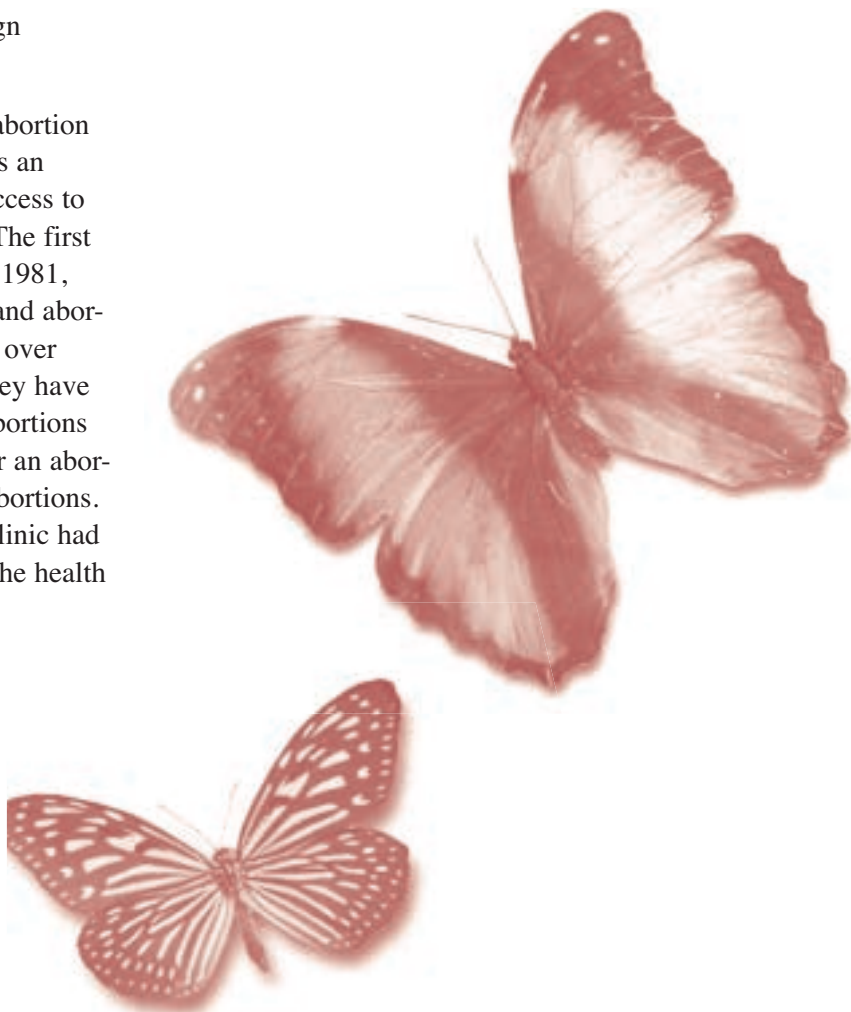
Native People have been practicing abortion and termination for as far back as the oral history goes^{xxii}. Traditionally, abortion, pregnancy, and childbirth were seen as a women's issue, and this procedure, along with other gynecological issues were resolved in private between the person who needed the care and midwives or other women in the community who had expertise in the area. Special care was taken to maintain the health and wellbeing of the pregnant person on a physical and spiritual level^{xxiii}. In a similar vein, abortions were tended to in the same way, with the pregnant person handling it themselves or with a skilled woman with traditional techniques, including the use of different herbals or using force to eliminate the fetus. These practices lead to much better results for pregnant people as well as the babies, with AI/AN communities having significantly lower rates of maternal and infant mortality and morbidity than other communities in the 19th century^{xxiv}.



However, colonization led to an intensive effort to eliminate traditional ways of life, and this included practices such as abortion, termination, and pregnancy-related care. This was a full-scale cultural genocide perpetrated by the US government with support from the Church in order to forcibly assimilate Indigenous people into white US culture^{xxv}. The routine separation of American Indian families through forcible removal and relocation first to boarding schools and later to white adoptive families severed pathways of traditional knowledge typically passed between women and families^{xxvi}. Nevertheless, whether by traditional methods or through mainstream clinics, the need for Native bodily autonomy through a right to abortion is imperative. Any effort to restrict this right is a violation of trust agreements between the US and sovereign Indigenous nations.

While Native Americans have many traditional abortion practices, receiving care at a mainstream clinic is an option some opt for, and any efforts to restrict access to these facilities is also a human rights violation. The first western abortion clinic opened in Sioux Falls in 1981, with Dr. Buck Williams as the medical director and abortion provider. In 1989, Planned Parenthood took over management of the clinic at his behest, which they have been operating ever since^{xxviii}. People seeking abortions were required to travel from all over the state for an abortion in Sioux Falls, or travel out of state to get abortions. After the implementation of abortion bans, the clinic had to shut down due to the restrictions. Given that the health of the parent would have to be in danger for an abortion to be performed, the procedure would likely be performed as emergency surgery in a hospital where it deemed medically necessary.

Traveling to Sioux Falls for abortions already represented a significant burden for those seeking abortions, as it required hours of traveling and often renting a hotel room. For Indigenous people with significantly fewer resources at their disposal, living far from cities, this was even more impactful. With the abortion bans now in place, those seeking abortions must travel out of state to clinics in Minnesota, Iowa, Nebraska, or Colorado, making receiving this service all the more challenging^{xxviii}. The restriction of traditional practices, as well as extreme challenges to seeking out abortions from a mainstream provider remove Indigenous people's right to self-determination and continue to perpetrate genocidal attacks on Native survival.



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Abortion Rates

The South Dakota Department of Health (DOH) Office of Health Statistics tracks all the induced abortions that occur in the state in its yearly Report of Induced Abortions. These reports include information about the total number of abortions performed in the state, as well as a breakdown of demographic information about patients, including race, age, children, and past terminations. The latest report currently available shows data for 2021.

The extreme drop occurred in March 2020 with the beginning of the COVID-19 pandemic, when non-emergency medical care became much more difficult to access. This

figure shows that abortion occurred regularly in South Dakota during between 2019-2021, though there were fluctuations in the rates. Abortion rates did not recover to pre-pandemic rates. This could be due to continued inaccessibility of medical care or related to ever increasing stigma in the state.

Although the South Dakota Department of health has not released official data for 2023, data is available in the Society for Family Planning's #WeCount Report. This report relies on using data from a database published by Advancing New Standards in Reproductive Health (ANSIRH) using data reported from clinics. This group found that, as expected, abortions decreased to less than ten, the smallest number they record.

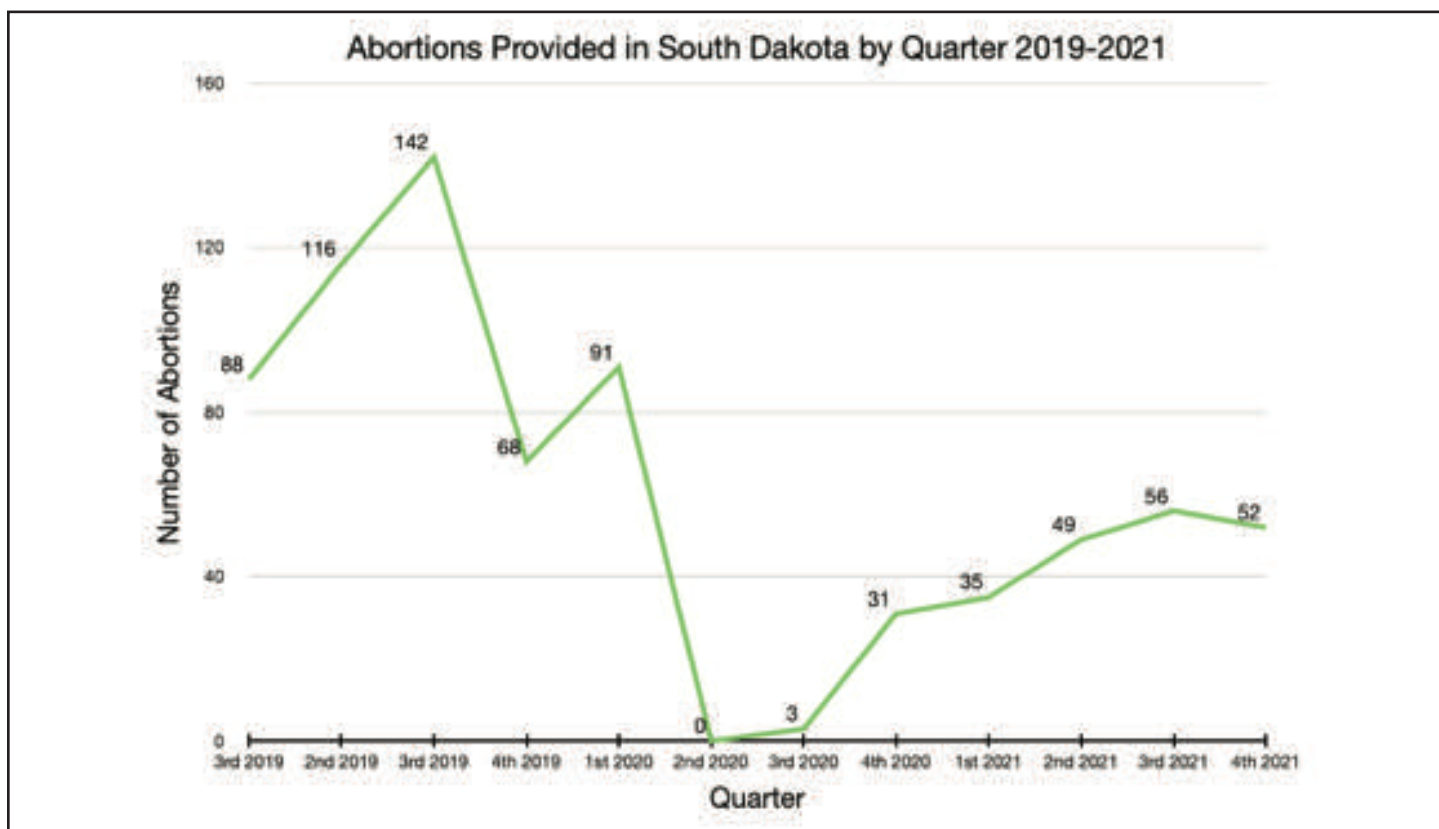


Figure 1: Graph showing the number of abortions performed in a three-month period between 2019 to 2021. Raw data by month was obtained from reports from DOH.^{xxix}

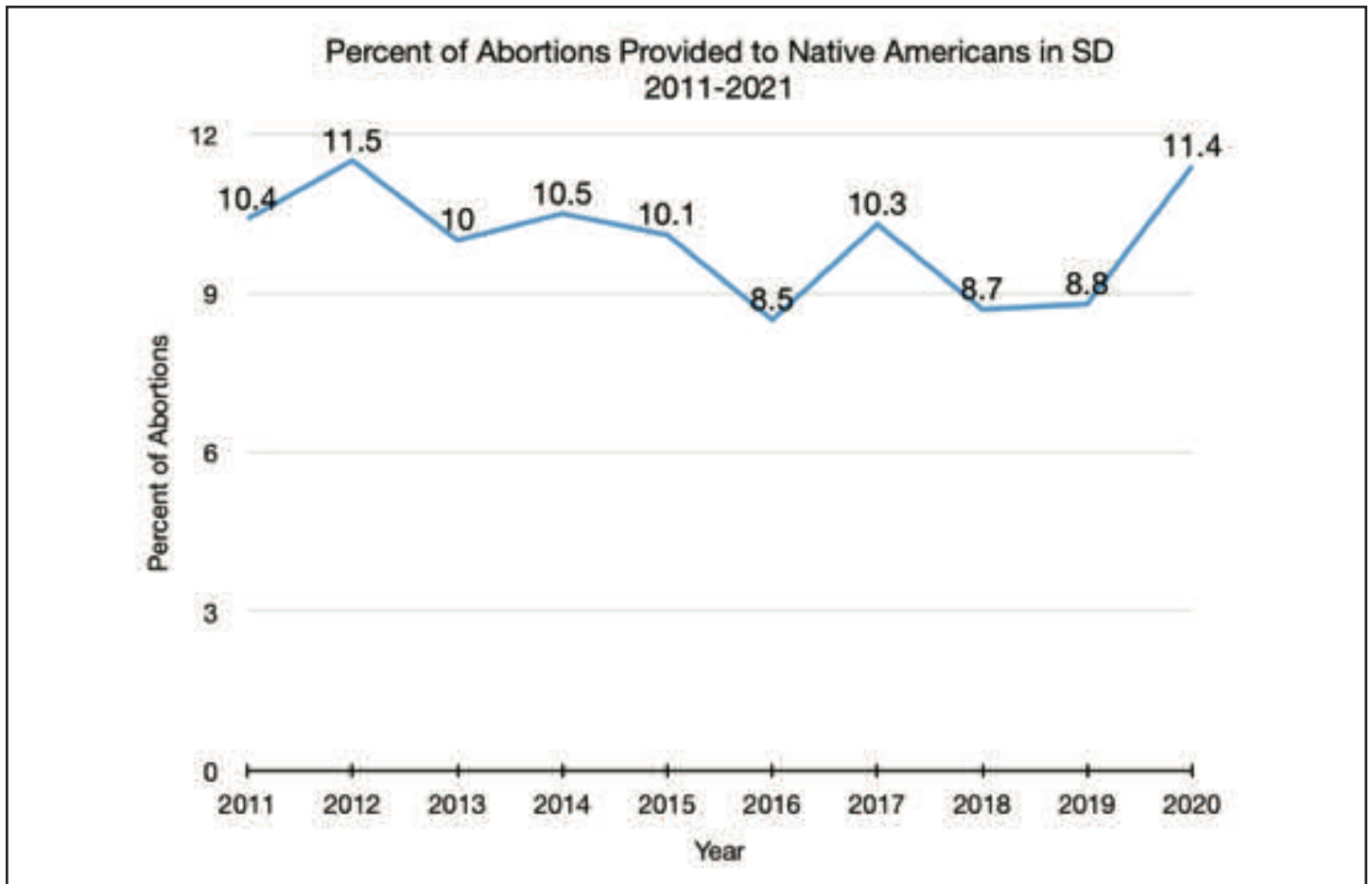


Figure 2: Graph showing the percentage of abortions performed in South Dakota that were provided to Native Americans between 2011-2021

However, the study also indicated a 100% decrease between April and August of 2022, implying that no abortions were performed in the state after the trigger ban came into effect in August of 2022^{xxx}. While other South Dakotans may have been able to travel out of state to seek an abortion, Native people were less likely to be able to make this trek, meaning that their abortion access is even more extremely limited than others in the state^{xxxi}. The South Dakota DOH also shows the breakdown of abortion recipients by race, revealing that Native Americans

receive abortions at slightly higher (statistically significant) rates than the general population. This data reflects the long history of abortion and termination amongst Native people, and dispels the myth that Native Americans do not receive abortions, something some conservative members of the community believe. If Native Americans would like to pursue an abortion, whether by traditional methods or at a mainstream clinic, they deserve the right to do so.

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Given the small sample size, the apparent fluctuations do not represent statistically significant differences . Data regarding Native Americans and abortion are not available on a national scale. The CDC records the race of an individual receiving an abortion as either black, white, or “other,” a category that includes Asians, Pacific Islanders, and Native Americans^{xxxiii}.

Abortion Bans and Native Bodies

Due to the abortion ban in South Dakota, residents must travel out of state to receive an abortion. While people in South Dakota have already been traveling out of state to get abortions for a long time, the option to get that care in state allowed people with more limited resources, or those living in the middle of the state, to access abortions . With abortion outlawed in South Dakota, it is even more difficult for low-income people in the middle of the state to receive an abortion. Given that Native Americans fall into this category at a higher rate than people of other backgrounds, they have more difficulty accessing abortions than people of other demographics^{xxxv}.

The disproportionate effect of lack of access to abortions in-state on Native Americans is already documented in South Dakota as well as other states. During the height of the COVID-19 pandemic, South Dakota's only abortion clinic, the Planned Parenthood in Sioux Falls, closed due to COVID-related restrictions on healthcare providers in the state. For the period it was closed, people seeking abortions had to travel out of state for care. Native Americans, often with limited resources and living farther from the borders to states with widespread abortion access, found it especially hard to get the care they needed . This effect was also documented when Texas enacted an abortion ban in 2021, forcing most abortion seekers to travel to New Mexico for care. Native Americans and other marginalized groups found this travel more difficult than other groups . Abortions clearly have a much larger impact on abortion access for Native Americans than the population as a whole.

As already established, abortion bans infringe on Native people's human right to self-determination in the realm of abortion. The US government has a long history of damaging practices regarding the reproductive health of Native people, including the forced sterilization of Indigenous women in the 1970s, and questionable use of Depo Provera and Norplant in the 1990s. Additionally, AI/AN people rely on the federally funded Indian Health Service for healthcare, meaning that their access to abortions had already been severely restricted due to the Hyde Amendment .

However, while abortion bans represent a human rights violation for everyone, the specific culture and traditions of Native Americans mean that the effects of this denial are all the more impactful. Tribes have a long history of abortions and terminations, as well as the use of fertility-controlling practices. Historically, on the most basic level, Native Americans have abstained from sexual intercourse while ovulating, but complicated combinations of herbal medicines and techniques were also used. Shoshone people from the Great Basin area and Bodéwadmi people from the Great Lakes area are known to have used stoneseed and dogbane to control fertility, and members of the Wichí tribe abort every first pregnancy to make future pregnancies easier, . This is a long cultural tradition that Indigenous People deserve to be able to continue to practice. Native Americans also deserve the right to seek out abortions at mainstream clinics, as in accordance with cultural practices, this decision is deeply personal, and neither the state nor any individual not directly asked should have the ability to influence this decision for the pregnant person.

Abortion bans sever this long tradition of bodily autonomy and self-determination. They represent a continuation of the settler colonial forced assimilation that the US has perpetrated against Native People since before the founding of the country. In the Native American tradition, abortion is a private matter that no one has the right to interfere with. Abortion bans violate essential rights, forcing Western and Christian ideas on communities that do not buy into them.

Additionally, anti-abortion advocates often claim that after an abortion, a person's mental health is significantly negatively impacted, however, the data does not support this claim. Researchers at University of California San Francisco found that in the short-term self-esteem and life satisfaction was higher amongst people who obtained an abortion than people who sought out an abortion and were denied, though over time, self-esteem and life satisfaction improved for all groups, until there was no significant difference between the groups,^{xl}. For Native Americans, significantly higher rates of mental illness and depression mean even short-term mental health problems can be damaging, so short term changes are significant^{xli}.

Financial Implications

Abortion bans do not only represent a human rights violation, but they also impose a unique financial burden. The only large-scale longitudinal study of the effects of abortion denial is the Turnaway Study, conducted by the UCSF Advancing New Standards in Reproductive Health. This study followed almost 1000 pregnant people across the US who sought abortions from 30 providers in 2008-2010. Over the course of five years, researchers conducted biannual interviews with these individuals, classifying them as receiving first term abortions, abortions near to the facility's gestational limit ("Near Limit"), or having

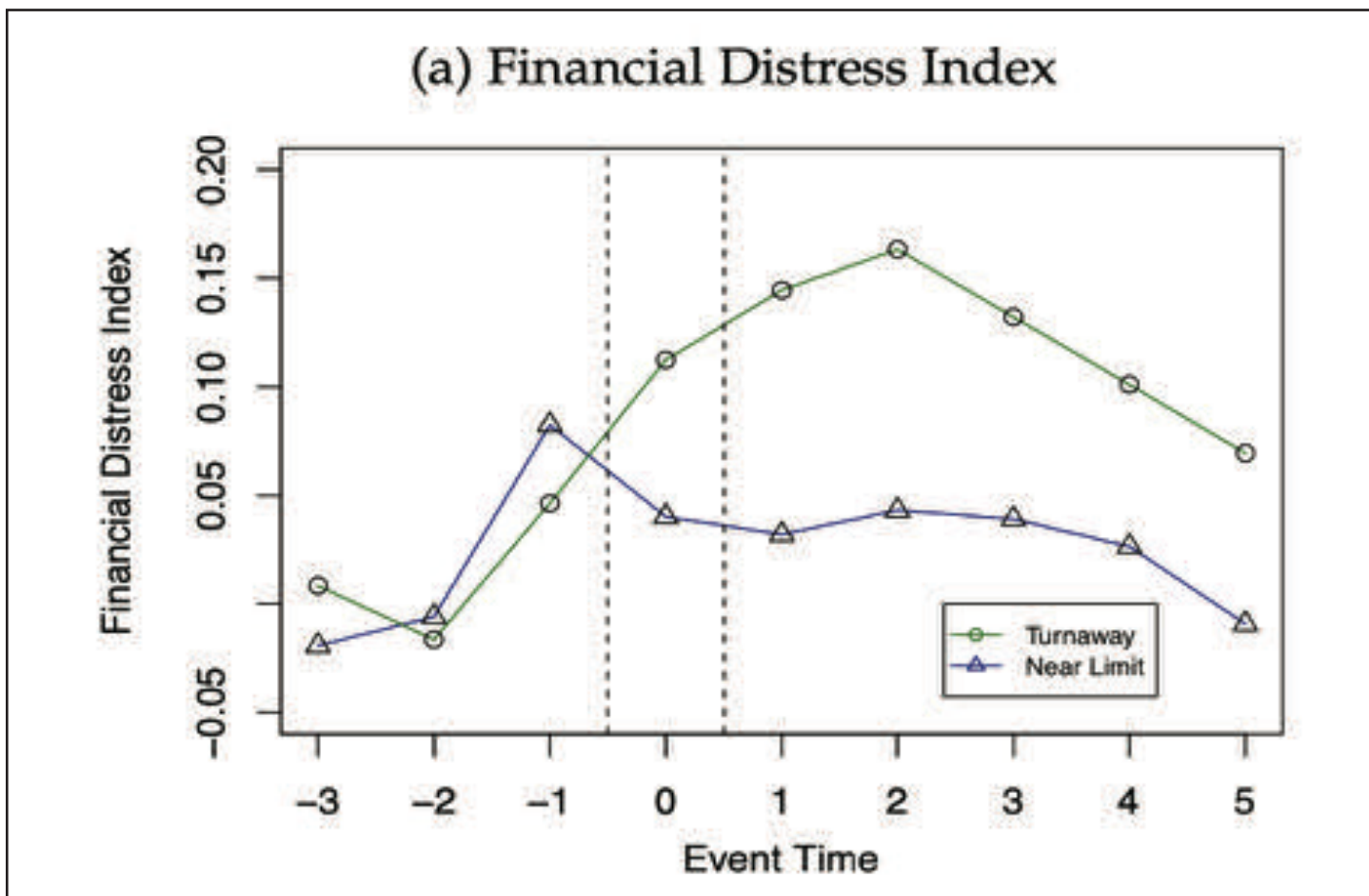


Figure 3: Figure from Miller paper showing the difference in the financial distress index between the turnaway and near limit groups in the Turnaway study^{xlv}.

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been denied an abortion due to being past the facility's gestational limit ("Turnaway group"). Of the Turnaway group, 32% miscarried or received an abortion elsewhere, and 68% carried to term^{xlii}. With statewide abortion bans, it is likely that fewer of these people would have been able to receive an abortion elsewhere, especially Native Americans who have trouble traveling longer distances for healthcare. While this study did not go into detail by state or race, it is possible to extrapolate based on state data and other studies.

While, as previously discussed, getting an abortion represents a significant financial burden to the recipient, especially without coverage from federal healthcare programs (Medicaid and the Indian Health Service) due to the Hyde Amendment, denial of an abortion has been shown to cause a significantly higher long-term financial burden. A study led by Sarah Miller found that although the near limit group and the Turnaway group began with similar levels of financial distress (as measured by factors such as outstanding debt, eviction, bankruptcy, and tax liens), in the 5 years following the abortion denial, the Turnaway group experienced greater financial distress than the Near Limit group, peaking at two years when their financial distress index score was over 3 times as high^{xliii}. Native Americans already experience much higher levels of financial distress, so these factors would only be compounded^{xliv}.

The US Department of Agriculture compiles reports detailing the cost of raising a child, including expenses such as clothing, housing, and education among others. For families living in rural areas with before tax incomes of below \$59,200 (averaging \$36,100) per year before taxes, as most Native Americans seeking abortions do, the average cost of supporting a child from birth until their 18th birthday was \$146,31^{xlvi}.

Between 2011-2021, Native Americans in South Dakota received 5101 abortions.

Using data from the Turnaway study, 68% of these people would have carried to term resulting in approximately

3469 live births. Using 2015 data as an approximate average across those 10 years, this represents \$507,549,390 of spending that would have been caused by denied abortions. In Native communities where large proportions of the population are unemployed or living below the poverty line, this is devastating. Not only does abortion denial eliminate personal bodily autonomy, but it also represents a significant economic burden.

Conclusion

While tribal lands have a certain level of sovereignty, this independence has been under attack recently, with attacks to the Indian Child Welfare Act (ICWA) attempting to call all Indian law into question. Though the recent case *Haaland v. Brackeen* upheld ICWA, supporting tribal sovereignty, the attacks continue. While in the past two decades, the Ogalala and Santee Sioux tribes have proposed opening an abortion clinic on their reservations despite restrictions in their state^{xlvii xlix}, the legality of this remains complicated, and many tribal members worry a move like that would only stoke the flames to attacks on tribal sovereignty as a whole^l. The only solution is to restore abortion access to all in the state at mainstream clinics as well as reviving traditional practices.

The abortion bans currently in effect in South Dakota constitute the continuation of a centuries-long genocide violently perpetrated by the settler colonial state. American Indian tribes have a long history of practicing abortions and an emphasis on bodily autonomy. The racist suppression of Indigenous knowledge severed generations of tradition and ways of life in favor of a white supremacist agenda. Abortion bans continue this legacy of genocide and to allow their continuation in any form is blatant support for abhorrent ideals and institutions that should never have existed in the first place.

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