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## Inefficient Mercy: The Procedural, Constitutional, and Prudential Issues that Plague Minnesota's Pardoning Process

Maddie Post

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**INEFFICIENT MERCY: THE PROCEDURAL,  
CONSTITUTIONAL, AND PRUDENTIAL ISSUES THAT  
PLAGUE MINNESOTA’S PARDONING PROCESS**

By: Maddie Post<sup>‡</sup>

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**I. INTRODUCTION**

In this paper, I will discuss the procedural, constitutional, and prudential issues that plague the current pardoning system employed in Minnesota. I ultimately advocate for the reform of this process. I begin by

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<sup>‡</sup> Maddie Post, 2022 Juris Doctor Candidate. The author is a third-year law student at Mitchell Hamline School of Law. In the summer of 2020, she served as a legal intern for the Office of Governor Tim Walz and Lieutenant Governor Peggy Flanagan. She is now a law clerk at the St. Paul City Attorney’s Office. Special thanks to Professor Eric Janus and *Mitchell Hamline Law Review* for assisting with this article.

describing the three grants of clemency that are available in Minnesota: pardons, commutations of sentences, and pardons extraordinary.<sup>1</sup> Next, I highlight the issues that burden the pardon system by looking at a particular applicant's case: Amreya Shefa.<sup>2</sup> In 2015, Shefa was convicted of first-degree manslaughter for killing her abusive husband, Habibi Tesema, who violently sexually assaulted her.<sup>3</sup> Despite her compelling pleas for forgiveness in front of the Board of Pardons, Shefa was denied a pardon.<sup>4</sup> Amreya Shefa's case stands as an example of the onerous challenges that pardon applicants in Minnesota face.<sup>5</sup>

Following this, I discuss the importance of pardons in our criminal justice system.<sup>6</sup> Not only do pardons and pardons extraordinary remedy many of the legal penalties and disabilities people experience because of their conviction, they are also a symbol of the reform the applicant has made in their life.<sup>7</sup> Pardons are recognition from the three highest officials in the state of Minnesota that an applicant is forgiven for their crime.<sup>8</sup> Despite the crucial importance of this process, pardons are rarely granted and have been granted in significantly declining numbers over the last few decades.<sup>9</sup>

Next, I discuss why pardons and pardons extraordinary have been granted in such low numbers over the last few years.<sup>10</sup> First, I begin with the procedural issues that affect grants of clemency in Minnesota.<sup>11</sup> This includes increased regulation of the procedural and substantive components for grants of clemency by the Minnesota Legislature.<sup>12</sup> Next, I examine the state constitutional issues that burden the pardoning system in Minnesota.<sup>13</sup> The Minnesota Board of Pardons consists of the governor, attorney general, and chief justice of the Minnesota Supreme Court, and all pardons must be granted through a unanimous vote by the Board.<sup>14</sup> I argue that the structure of the Board, coupled with the unanimous vote requirement, is inconsistent with the structure and text of the Minnesota Constitution.<sup>15</sup>

Next, I discuss the prudential issues with the Board of Pardons.<sup>16</sup> I

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> See *infra* Part III.

<sup>3</sup> See *infra* Part III.A.

<sup>4</sup> See *infra* Part III.B.

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part IV.B.

<sup>7</sup> See *infra* Part IV.A.

<sup>8</sup> See *infra* Part IV.A.

<sup>9</sup> See *infra* Part V.

<sup>10</sup> See *infra* Part V.A.

<sup>11</sup> See *infra* Part V.A.

<sup>12</sup> See *infra* Part V.A.

<sup>13</sup> See *infra* Part V.B.

<sup>14</sup> See *infra* Part V.B.

<sup>15</sup> See *infra* Part V.B.

<sup>16</sup> See *infra* Part V.C.

argue that the current structure of the Board is unwise policy.<sup>17</sup> I find it unwise to vest pardoning power exclusively in the hands of three of the top officials in Minnesota.<sup>18</sup> I also find it unwise for the chief justice of the Minnesota Supreme Court to be involved in this process.<sup>19</sup>

Finally, after discussing the problems that continue to burden the process of granting pardons in Minnesota, I describe a potential solution to these issues.<sup>20</sup> I recommend that the Minnesota Legislature pass a law to create a Clemency Review Commission to change the current structure of this process.<sup>21</sup> This solution was proposed in a bill in 2019.<sup>22</sup> Unfortunately, this bill died when the legislative session ended.<sup>23</sup> I argue that legislators should continue to push for a Clemency Review Commission to reform the pardoning process in Minnesota.<sup>24</sup>

I ultimately conclude that the process for granting pardons in Minnesota is in dire need of reform and that the Minnesota Legislature needs to make an active effort in the upcoming legislative session to solve some of these problems.<sup>25</sup> Pardons and pardons extraordinary play an incredibly important role in our criminal justice system, and especially in the lives of those that are granted clemency.<sup>26</sup> It is in the best interest of the State of Minnesota that this process is fair and unburdened.<sup>27</sup>

## II. MINNESOTA'S PARDONING PROCESS

Under Minnesota law, there are three grants of clemency available to those convicted of a crime: pardons, commutations of sentences, and pardons extraordinary.<sup>28</sup> A pardon is “an act of forgiveness” that exempts an applicant from the punishment imposed by their conviction.<sup>29</sup> A commutation is a reduction of a sentence.<sup>30</sup> Pardons and commutations of sentences are both available to people currently serving their sentence.<sup>31</sup> From 1940 to 1989, the Board of Pardons commuted 741 sentences,

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<sup>17</sup> See *infra* Part V.C.

<sup>18</sup> See *infra* Part V.C.1.

<sup>19</sup> See *infra* Part V.C.2.

<sup>20</sup> See *infra* Part VI.

<sup>21</sup> See *infra* Part VI.

<sup>22</sup> See *infra* Part VI.

<sup>23</sup> See *infra* Part VI.

<sup>24</sup> See *infra* Part VI.

<sup>25</sup> See *infra* Part VII.

<sup>26</sup> See *infra* Part VII.

<sup>27</sup> See *infra* Part VII.

<sup>28</sup> MINN. STAT. § 638.02 (2020).

<sup>29</sup> 2019 *Legislative Report*, MINN. BD. OF PARDONS 2 (Jan. 10, 2020), <https://www.leg.mn.gov/docs/2020/mandated/200130.pdf> [https://perma.cc/ZC82-C639].

<sup>30</sup> *Id.*

<sup>31</sup> *Application Process*, MINN. DEP'T OF CORR., <https://mn.gov/doc/about/pardon-board/application-process/> [https://perma.cc/7LCT-LZQE].

granting commutations for eighty-four percent of applicants.<sup>32</sup> However, the Board of Pardons has only granted one absolute pardon since 1984<sup>33</sup> and two commutations of sentences since 1981.<sup>34</sup> Because the Board of Pardons grants absolute pardons and commutations at such a low rate, the most realistic grant of clemency for applicants to seek is a pardon extraordinary.<sup>35</sup>

A pardon extraordinary is “statutorily-created relief granted to applicants who have served their sentences.”<sup>36</sup> Pardons extraordinary are granted if the Board of Pardons determines that the person is “of good character and reputation.”<sup>37</sup> To be eligible for a pardon extraordinary, an individual convicted of a crime of violence must be crime-free for a minimum of ten years.<sup>38</sup> For non-violent offenders, the individual must not commit a crime for five years.<sup>39</sup> Federal offenders and individuals convicted of crimes in other states are not eligible for a pardon extraordinary.<sup>40</sup> Unless the Board unanimously votes in writing to put this waiting period aside, an application for a pardon extraordinary cannot be filed until this time period has elapsed.<sup>41</sup>

The Minnesota Board of Pardons consists of the governor, the attorney general, and the chief justice of the Minnesota Supreme Court.<sup>42</sup> Applications for pardons extraordinary are investigated prior to the Board’s meeting.<sup>43</sup> The county attorney, the judge involved in the case, and any victims are asked for input on the application.<sup>44</sup> If the Board grants a pardon extraordinary, the conviction is set aside and nullified.<sup>45</sup> Once someone is

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<sup>32</sup> Andy Mannix & Briana Bierschbach, *Far from Grace: How Minnesota Radically Changed the Way it Forgives Criminals*, MINNPOST (July 30, 2015), <https://www.minnpost.com/politicspolicy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/> [https://perma.cc/9KP7-NR8V].

<sup>33</sup> *Id.* In 2020 the Board granted the first absolute pardon in four decades to Maria Elizondo, a woman convicted in 2012 of fraudulently receiving \$25,000 in food stamps and benefits. Esme Murphy, *Minnesota Board of Pardons Grants First Full Pardon in 37 Years to Maria Elizondo*, CBS MINN. (Jan. 25, 2021), <https://minnesota.cbslocal.com/2021/01/25/minnesota-board-of-pardons-grants-first-full-pardon-in-37-years-to-maria-elizondo/> [https://perma.cc/3E6Q-7KMA].

<sup>34</sup> Mannix & Bierschbach, *supra* note 32. The Board of Pardons granted all three of these acts of clemency in 2020. *2020 Legislative Report*, MINN. BD. OF PARDONS 2 (Feb. 12, 2021), [https://mn.gov/doc/assets/Board%20of%20Pardons%202020%20Report%20%28final%29\\_cm1089-468448.pdf](https://mn.gov/doc/assets/Board%20of%20Pardons%202020%20Report%20%28final%29_cm1089-468448.pdf) [https://perma.cc/85A4-FNDF].

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> MINN. STAT. § 638.02, subdiv. 2 (2020).

<sup>38</sup> MINN. STAT. § 638.02, subdiv. 2(1) (2020); MINN. STAT. § 624.712, subdiv. 5 (2020) (defining a “crime of violence”).

<sup>39</sup> MINN. STAT. § 638.02, subdiv. 2(2) (2020).

<sup>40</sup> MINN. CONST. art. V, § 7; MINN. STAT. § 638.01 (2020).

<sup>41</sup> MINN. STAT. § 638.02, subdiv. 2.

<sup>42</sup> MINN. CONST. art. V, § 7.

<sup>43</sup> Minn. Dep’t of Corr., *supra* note 31.

<sup>44</sup> *Id.*

<sup>45</sup> MINN. STAT. § 638.02, subdiv. 2(2).

granted a pardon extraordinary, they will never be required to disclose their conviction again other than “in a judicial proceeding or as part of the licensing process for peace officers.”<sup>46</sup> However, a pardon extraordinary does not expunge the crime or seal the person’s record.<sup>47</sup> After a pardon extraordinary is granted, a copy of the pardon is filed with the district court where the conviction occurred.<sup>48</sup> The court is then directed to set aside the conviction and keep a copy of the pardon on file.<sup>49</sup>

### III. EXPOSING THE PROBLEMS: AMREYA SHEFA’S CASE

#### *A. Amreya Shefa’s Conviction and Sentencing*

One recent pardon applicant in Minnesota, Amreya Shefa, helps illuminate the procedural, constitutional, and prudential issues that burden grants of clemency in this state. Amreya Shefa met Habibi Tesema in Addis Abba, Ethiopia, in 2006.<sup>50</sup> The couple married one month later.<sup>51</sup> At the beginning of their marriage, Tesema lived in the United States while Shefa remained in Ethiopia.<sup>52</sup> Tesema agreed that after the couple had three children together, he would bring Shefa and the children over to the United States to live with him.<sup>53</sup> In 2012, after six years of marriage, Tesema brought Shefa and their two children to live with him in Richfield, Minnesota.<sup>54</sup> Shefa had no friends, family, or independent income in the United States and became dependent on Tesema.<sup>55</sup> In contrast, Tesema had lived in the United States for almost twenty years, spoke English well, worked full-time, owned a home, and had a large network of friends and family in Minnesota.<sup>56</sup>

After bringing Shefa and the children over to the United States, Tesema became abusive.<sup>57</sup> Shefa claimed that throughout their marriage,

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<sup>46</sup> *Id.*

<sup>47</sup> *Minnesota Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT, <http://ccresourcecenter.org/state-restoration-profiles/minnesota-restoration-of-rights-pardon-expungement-sealing/> [https://perma.cc/ZW56-F9XY].

<sup>48</sup> *See id.* (citing MINN. STAT. § 638.02, subdiv. 3).

<sup>49</sup> *Id.*

<sup>50</sup> *State v. Amreya Rahmeto Shefa*, No. 27-CR-13-39734, 2015 WL 1279762, at \*1 (Minn. Dist. Ct. Jan. 30, 2015).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* From 2006 to 2012, Tesema visited Shefa numerous times in Ethiopia. During this period, Shefa gave birth to two children, a boy and a girl. *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*9.

<sup>56</sup> *Id.* at \*2.

<sup>57</sup> Matt Sepic, *Richfield Woman Asks Pardons Board to Help Her Avoid Persecution in Home Country*, MPR NEWS (June 26, 2019), <https://www.mprnews.org/story/2019/06/26/shefa-clemency-deporation-minnesota-board-pardons> [https://perma.cc/F22W-YPNN].

Tesema forced her to perform sex acts against her will.<sup>58</sup> On one occasion, Shefa claimed that Tesema and an unknown man had sex with each other and then sexually assaulted her in the basement of their home.<sup>59</sup> Later, Tesema told Shefa that as a result of that assault, she “likely had contracted AIDS.”<sup>60</sup> Shefa has claimed that throughout their marriage, Tesema raped her frequently, allowed his friends to rape her, beat her, and used her for forced labor.<sup>61</sup>

In a recorded interview, Shefa told Richfield Detective Joseph Edwards, “I am not even afraid of Allah (God) as I am afraid of [Mr. Tesema]” and “I am afraid of [Mr. Tesema] all of the time.”<sup>62</sup> Shefa stated that she never left Tesema because, “I don’t know my way around, I am not familiar with the country. I don’t have any relative [sic], . . . [I] don’t have anyone, where do I go? In fact, he was telling me to leave, but where do I go? I don’t know anyone.”<sup>63</sup> Shefa had no power in the relationship, no control over the couple’s assets, and remained dependent upon Tesema in the United States.<sup>64</sup> For these reasons, she remained in the relationship despite the abuse.<sup>65</sup>

On the night of December 1, 2013, Tesema had been drinking alcohol and smoking khat.<sup>66</sup> Tesema began to initiate sex with Shefa.<sup>67</sup> Shefa claimed that after the couple had vaginal intercourse, Tesema made her perform oral sex on him.<sup>68</sup> Then Tesema proceeded to penetrate Shefa’s anus with a dildo.<sup>69</sup> Tesema played pornographic movies on his computer and asked her, “If these people are doing it, why can’t you do it?”<sup>70</sup> Tesema asked Shefa if she would have anal intercourse with him and told her that if she

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<sup>58</sup> *Id.*

<sup>59</sup> *Shefa*, 2015 WL 1279762, at \*2.

<sup>60</sup> *Id.* At trial, Shefa claimed that Tesema “took her to an unknown hospital where she received medication for an abortion and AIDS.” *Id.* No evidence was offered concerning either the alleged abortion or AIDS at trial. *Id.* A member of Shefa’s legal team claims she is now HIV positive. Sepic, *supra* note 57.

<sup>61</sup> Compl. at 10, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

<sup>62</sup> *Shefa*, 2015 WL 1279762, at \*2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* at \*3. Khat is a stimulant drug made from the leaves and twigs of an evergreen shrub native to Ethiopia. The active ingredients are cathine and cathinone. *Drug Fact Sheet: Khat*, U.S. DRUG ENF’T ADMIN., <https://www.dea.gov/factsheets/khat> [<https://perma.cc/W6UL-EGNZ>]. Tesema’s blood was tested for the presence of Khat, but none was found. *Shefa*, 2015 WL 1279762, at \*3 n.2. However, there was no testimony on the amount of time that Khat would remain in Tesema’s blood after consumption. *Id.* There was evidence that Tesema had been drinking; his blood alcohol concentration was .09, and bottles of alcohol were found at the scene. *Id.*

<sup>67</sup> *Shefa*, 2015 WL 1279762, at \*3.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* Shefa’s account of the assault was corroborated by evidence that two dildos were in the room where the homicide occurred. *Id.*

<sup>70</sup> *Id.*

refused to have sex with him, he would find someone who would.<sup>71</sup>

After Tesema penetrated Shefa with a dildo, Shefa proceeded to pick up a knife and stab Tesema.<sup>72</sup> Shefa later explained that she had told Tesema, “No, you’re not going to do that to me! You’re not going to do that to me!”<sup>73</sup> Shefa stabbed Tesema thirty times.<sup>74</sup> The Chief Hennepin County Medical Examiner determined that a stab wound through both pumping chambers of the heart killed Tesema.<sup>75</sup>

Shefa was charged with second-degree murder under Minnesota Statutes section 609.19, subdivision 1(1).<sup>76</sup> Shefa raised two defenses at trial: self-defense and the heat of passion defense.<sup>77</sup> She requested that the judge consider the lesser charge of first-degree manslaughter in violation of Minnesota Statutes section 609.20, subdivision 1.<sup>78</sup> At Shefa’s bench trial, Judge Elizabeth Cutter denied Shefa’s claim of self-defense, finding that the number of sharp force injuries inflicted upon Tesema, in addition to his level of intoxication, indicated that the force Shefa used exceeded the amount necessary to defend herself.<sup>79</sup> However, the court did find that the sexual assault was sufficient to show provocation for the use of the heat of passion defense.<sup>80</sup> Because the court found that the State had not proven beyond a reasonable doubt that Shefa did not act in the heat of passion, she was convicted of first-degree manslaughter.<sup>81</sup> Shefa served five years in prison at the Shakopee Correctional Facility without incident and with good behavior.<sup>82</sup> Upon her pending release, she was charged as removable from

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<sup>71</sup> *Id.* at \*6.

<sup>72</sup> *Id.* at \*3. Shefa testified that the knife was in the room because she had used it earlier to cut an orange. *Id.* This was corroborated by evidence that there was a sliced orange in the room. *Id.*

<sup>73</sup> *Id.* at \*7.

<sup>74</sup> *Id.* at \*3.

<sup>75</sup> *Id.* at \*5.

<sup>76</sup> *Id.* at \*7. *See* MINN. STAT. § 609.19, subdiv. 1(1) (2015). Whoever “causes the death of a human being with intent to effect the death of that person or another, but without premeditation” is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years. *Id.*

<sup>77</sup> *Shefa*, 2015 WL 1279762, at \*7. *See* MINN. STAT. § 609.20(1) (2020). First-degree manslaughter is when the defendant “intentionally causes the death of another person in the heat of passion provoked by such words or acts of another as would provoke a person of ordinary self-control under like circumstances.” *Id.*

<sup>78</sup> *Shefa*, 2015 WL 1279762, at \*1. Shefa waived her right to a jury prior to the beginning of trial. *Id.*

<sup>79</sup> *Id.* at \*9.

<sup>80</sup> *Id.* at \*8–9.

<sup>81</sup> *Id.* at \*9. Shefa appealed her case to the Minnesota Court of Appeals in 2016, claiming that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that she intended to cause the death of Tesema and was not acting in self-defense. *State v. Shefa*, No. A15-0974, 2016 WL 3042908, at \*4 (Minn. Ct. App. May 31, 2016). The court of appeals affirmed the trial court, agreeing that the number of sharp force injuries inflicted upon Tesema greatly exceeded the degree of force necessary to defend herself. *Id.*

<sup>82</sup> Compl. at 11, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

the United States and taken into Immigration and Customs Enforcement (“ICE”) custody.<sup>83</sup> Despite finishing her sentence, Shefa was detained at the Kandiyohi County Jail in Willmar, Minnesota, in anticipation that the Department of Homeland Security would deport her.<sup>84</sup>

### *B. The Denial of Amreya Shefa’s Pardon Application*

After serving her sentence in Shakopee, Shefa filed her first application for a pardon extraordinary in June of 2018.<sup>85</sup> Her application was denied because it was “deemed undeserving by the secretary for further review by the board.”<sup>86</sup> In December of 2018, Shefa filed a second pardon application.<sup>87</sup> Her second application was also denied on the mistaken conclusion that the prior application had been denied on its merits.<sup>88</sup>

Shefa challenged this denial and was permitted to present the issue during the Board of Pardons meeting in June of 2019.<sup>89</sup> Shefa begged for forgiveness over the phone from the Kandiyohi County Jail, where she was being detained by ICE.<sup>90</sup> She told the Board that if she was not granted a pardon, she would be deported to Ethiopia.<sup>91</sup> She claimed her husband’s family in Ethiopia would have her killed if she ever returned.<sup>92</sup> Shefa told the Board, “I am very remorseful for killing my husband.”<sup>93</sup> At the meeting, Chief Justice Lori Gildea announced her intention to deny the pardon if Shefa was allowed to apply.<sup>94</sup> Chief Justice Gildea said, “I don’t support the pardon. The crime caused the death of a person, so it’s on that basis that I don’t support Ms. Shefa’s pardon application.”<sup>95</sup>

In December of 2019, Shefa requested that the merits of her case go before the Board of Pardons once again.<sup>96</sup> This request was granted, and the Board agreed to hear her case at the Board of Pardons meeting in June of

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<sup>83</sup> *Id.* See 8 U.S.C. § 1227 (2008). Any alien who “(I) is convicted of a crime involving moral turpitude committed within five years [...] after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.” *Id.*

<sup>84</sup> Brandon Stahl, *Pardon Hearing Set for Rape Survivor Who Served Time After Killing Husband*, STAR TRIB. (Minneapolis) (June 17, 2019), <https://www.startribune.com/rape-survivor-gets-her-shot-at-freedom/511420192/> [https://perma.cc/U2ZD-WGRC].

<sup>85</sup> Compl. at 11, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 12.

<sup>90</sup> Sepic, *supra* note 57.

<sup>91</sup> Brett Hoffland, *Minnesota Woman Convicted of Killing Her Husband Pleading for a Pardon*, KSTP (June 25, 2019), <https://kstp.com/news/minnesota-woman-convicted-of-killing-her-husband-pleading-for-a-pardon/5402752/> [https://perma.cc/LN7K-368W].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Compl. at 12, *Shefa v. Ellison*, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

2020.<sup>97</sup> In her application, Shefa stated that only a pardon or commutation could serve the interests of justice because although her case was correctly decided, her case was one of “unfortunate guilt.”<sup>98</sup>

Shefa stated that her punishment for killing her husband has been more than just incarceration.<sup>99</sup> As a result of her conviction, Shefa lost parental rights, faced possible death at the hands of her husband’s family if she returned to Ethiopia, and would be unable to manage her HIV in Ethiopia.<sup>100</sup> Shefa also maintained that domestic violence victims are good candidates for clemency and that the Board would be sending a message that gender-based violence would not be tolerated.<sup>101</sup>

Despite these compelling pleas, Shefa’s pardon application was denied.<sup>102</sup> On June 12, 2020, Governor Walz and Attorney General Ellison voted to grant Shefa’s pardon request.<sup>103</sup> Both officials supported Shefa’s petition for a pardon extraordinary.<sup>104</sup> However, Chief Justice Gildea voted to deny Shefa’s petition, just as she said she would.<sup>105</sup> In response, Shefa filed a lawsuit seeking declaratory and injunctive relief against Governor Walz, Attorney General Ellison, and Chief Justice Gildea, all in their official capacities.<sup>106</sup> In the complaint, Shefa challenged the constitutionality of Minnesota Statutes section 638.02 and its requirement for a unanimous vote from the Board of Pardons.<sup>107</sup> She claimed that the statute violated the Minnesota Constitution because the constitution vests the pardoning power

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<sup>97</sup> *Id.*

<sup>98</sup> Application for a Pardon or Commutation: Amreya Shefa, MINN. DEP’T OF CORR. 4 (Nov. 29, 2018).

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Compl. at 2, Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

<sup>103</sup> *Id.* at 13.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* On May 7, 2020, Shefa filed a lawsuit against Attorney General Ellison in his official capacity, seeking declaratory and injunctive relief in anticipation of Chief Justice Gildea denying her pardon application. *See* Compl., Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020). Shefa claimed that the requirement of a unanimous vote from the Board of Pardons as required by Minnesota Statutes Section 638.02 violated the pardon power granted to the governor under the Minnesota Constitution. *Id.* at 2. That case was dismissed without prejudice, on the basis that Shefa’s claims were not yet ripe for adjudication. *See* Order Denying Motion and Order for Judgment, Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. June 3, 2020). The district court found that “Chief Justice Gildea’s comments at Shefa’s June 2019 pardon hearing are insufficient to jeopardize any constitutional rights that would merit declaratory or injunctive relief. The Court cannot predict how Chief Justice Gildea . . . will vote regarding Shefa’s pardon application.” *Id.* at 7. Because Chief Justice Gildea had not yet denied Shefa’s pardon application, Shefa’s injury was hypothetical and she could not seek relief. *Id.* After her pardon application was officially denied at the June meeting, she filed another lawsuit in July. Compl., Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

<sup>106</sup> Compl., Shefa v. Ellison, No. 62-CV-20-4090 (Minn. Dist. Ct. July 17, 2020).

<sup>107</sup> *Id.* at 13.

with the governor.<sup>108</sup> Shefa claimed that “[b]ut for the unanimous vote’ required under 638.02,” her pardon would have been granted.<sup>109</sup>

Shefa filed a motion for summary judgment, asking the court to find Minnesota Statutes section 638.02, subdivision 1 unconstitutional and order Governor Walz to reconsider her pardon application.<sup>110</sup> Agreeing with Shefa’s constitutional challenge to the current regulation of the Board of Pardons, Defendant Governor Walz filed a motion for summary judgment asking the court to find Minnesota Statutes sections 638.01 and 638.02 unconstitutional<sup>111</sup> and to grant Shefa’s pardon *nunc pro tunc*.<sup>112</sup> In opposition, Defendants Attorney General Ellison and Chief Justice Gildea filed a motion for summary judgment seeking dismissal of Shefa’s complaint.<sup>113</sup>

Ramsey County Judge Laura Nelson sided with Shefa and Governor Walz, finding the second sentence of Minnesota Statutes section 638.01 unconstitutional.<sup>114</sup> Judge Nelson found that the plain language of article V, section 7 of the Minnesota Constitution “names the Governor separate and apart from the Board of Pardons, of which he is a member.”<sup>115</sup> Based on this plain language, Judge Nelson concluded that the governor has some pardon power separate from the Board of Pardons.<sup>116</sup> Accordingly, Judge Nelson found that Minnesota Statutes sections 638.01 and 638.02, subdivision 1, which give pardon power to the Board of Pardons alone, are

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<sup>108</sup> *Id.* at 13–14.

<sup>109</sup> Pl.’s Mem. of Law in Support of Mot. for Summ. J. 11, *Shefa v. Ellison*, No. 62-CV-20-4090 (Minn. Dist. Ct. Nov. 20, 2020) (quoting the “but for” language utilized by the governor).

<sup>110</sup> *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 1679835, at \*1 (Minn. Dist. Ct. Apr. 20, 2021). On June 24, 2021, this matter came before Judge Nelson again to discuss whether this decision prohibited the Board of Pardons from meeting. *Id.* Judge Nelson held that the Board’s constitutional authority, as well as Minnesota Statutes section 638, remains in full force and effect, except for the second sentence of Minnesota Statutes section 638.01 and Minnesota Statutes section 638.02, subdivision 1. Judge Nelson clarified that nothing in the order prohibited the Board of Pardons from meeting as mandated by Minnesota Statutes section 638.04. *Id.*

<sup>111</sup> Despite his position as a defendant in the lawsuit, Governor Walz sided with the plaintiff. Because of this stance, he obtained outside counsel with the Ciresi Conlin law firm. Stephen Montemayor, *Minnesota’s Unanimous Pardon Board Requirement Ruled Unconstitutional*, STAR TRIB. (Minneapolis) (Apr. 21, 2021), <https://www.startribune.com/minnesota-s-unanimous-pardon-board-requirement-ruled-unconstitutional/600048574/?refresh=true> [https://perma.cc/2R2B-X2QZ].

<sup>112</sup> *Id.* A *nunc pro tunc* entry is an entry made now of something actually previously done to have effect of the former date. *Lazar v. Ganim*, 220 A.3d 18, 33 n.4 (Conn. 2019) (expressing *nunc pro tunc* literally means “now for then.”).

<sup>113</sup> *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 3440678, at \*1 (Minn. Dist. Ct. July 2, 2021).

<sup>114</sup> Montemayor, *supra* note 111.

<sup>115</sup> *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 1679835, at \*6 (Minn. Dist. Ct. Apr. 20, 2021).

<sup>116</sup> *Id.*

unconstitutional.<sup>117</sup>

The defendants appealed Judge Nelson’s ruling to the Minnesota Supreme Court.<sup>118</sup> On September 16, 2021, a day after hearing oral arguments, Justice G. Barry Anderson, signed an order reversing Judge Nelson’s ruling.<sup>119</sup> The Minnesota Supreme Court held that the statutes governing the Board are constitutional.<sup>120</sup> The court issued the order prior to releasing an opinion “[s]o as not to impair the orderly function of the board of pardons.”<sup>121</sup>

Amreya Shefa’s case illustrates the multitude of issues that plague the current pardoning system in Minnesota. Her case demonstrates the procedural issues that burden the current process, such as when her application was denied because the Board mistakenly believed that her case had been denied on the merits.<sup>122</sup> Her case also demonstrates the constitutional issues that are presented when the head of the judiciary, Chief Justice Gildea, has absolute veto power over a process originally designed for the executive of Minnesota’s government to grant.<sup>123</sup> There are also prudential issues that arise when offenders go before the head of the judiciary to ask for mercy.<sup>124</sup> Amreya Shefa’s case exemplifies many of the issues that burden this system today.

#### IV. THE IMPORTANCE OF PARDONS

The pardoning process in Minnesota needs reform because of the crucial role clemency plays in the criminal justice system and in the lives of those convicted of crimes. Pardons extraordinary in Minnesota are a grant of clemency that give those convicted of a crime the opportunity to discharge many of the lingering consequences of a criminal conviction.<sup>125</sup> In addition to a court-imposed sentence, individuals with criminal convictions also face a range of legal penalties and disabilities.<sup>126</sup> After a conviction, many face a loss of civil rights, limited access to housing, loss of employment, and loss of welfare benefits.<sup>127</sup> In addition to the permanent changes to an individual’s

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<sup>117</sup> *Id.*

<sup>118</sup> Shefa v. Ellison, 964 N.W.2d 157 (Minn. 2021).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Chief Justice Gildea recused herself from the case because of her status as a defendant in the matter. Brian Bakst, *MN Supreme Court Blocks Remake of Pardon Process*, MPR NEWS (Sept. 16, 2021), <https://www.mprnews.org/story/2021/09/16/mn-supreme-court-blocks-remake-of-pardon-process> [<https://perma.cc/8N9V-93J6>].

<sup>121</sup> *Id.*

<sup>122</sup> Compl. at 11, Shefa v. Ellison, No. 27-CV-20-6768 (Minn. Dist. Ct. May 7, 2020).

<sup>123</sup> See *infra* Part V.B.

<sup>124</sup> See *infra* Part V.C.

<sup>125</sup> *Board of Pardons*, MINN. DEP’T OF CORR., <https://mn.gov/doc/about/pardon-board/> [<https://perma.cc/ERX5-TDMS>].

<sup>126</sup> Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* 6 (2005).

<sup>127</sup> *Id.*

legal status, criminal convictions are accompanied by stigma, discrimination, and shame.<sup>128</sup>

*A. Pardons Play an Important Role in the Lives of Individuals Who Have Committed a Crime*

In Minnesota, a felony conviction deprives individuals serving their sentence of their civil rights and full citizenship.<sup>129</sup> These rights include the right to vote, hold office, and own a firearm.<sup>130</sup> Upon release from their sentence, the right to vote and hold office is restored.<sup>131</sup> However, the right to a firearm is not restored upon release.<sup>132</sup> Rights to a firearm may be regained if the individual petitions the court for restoration.<sup>133</sup> A court “may grant the relief sought if the person shows good cause to do so and the person has been released from physical confinement.”<sup>134</sup> However, individuals convicted of a “crime of violence” are “not entitled to ship, transport, possess, or receive a firearm or ammunition for the remainder of [their] lifetime.”<sup>135</sup>

Additionally, a pardon extraordinary has immense value for convicted individuals looking for employment.<sup>136</sup> While it is the policy of the State of Minnesota to encourage the rehabilitation of individuals convicted of a crime through the opportunity to “secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession, or business,” there are numerous setbacks to getting employment post-conviction.<sup>137</sup> In Minnesota, public and private employers are prohibited from inquiring into the criminal record or history of an applicant until the applicant has been selected for an interview.<sup>138</sup> However, this law does not require or encourage private and public employers to hire individuals once they look into their criminal history.<sup>139</sup>

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at Minnesota-1.

<sup>130</sup> *Id.* (citing MINN. STAT. § 609.195 (2005)).

<sup>131</sup> *Id.* The right to hold public office is still deprived if the individual was convicted of bribery. MINN. STAT. § 609.42, subdiv. 2 (2020).

<sup>132</sup> *Id.*

<sup>133</sup> MINN. STAT. § 609.165, subdiv. 1(a) (2020).

<sup>134</sup> *Id.* § 609.165, subdiv. 1(d).

<sup>135</sup> *Id.* § 609.165, subdiv. 1(a).

<sup>136</sup> Mannix & Bierschbach, *supra* note 32.

<sup>137</sup> LOVE, *supra* note 126.

<sup>138</sup> MINN. STAT. § 364.021(a). Governor Dayton signed the Criminal Background Check bill, which expanded Ban the Box to private employers starting on January 1, 2014. This requirement has been in effect for public employers in Minnesota since 2009. *Criminal Background Checks, Facts About Ban the Box*, MINN. DEP’T OF HUM. RTS., <https://mn.gov/mdhr/employers/criminal-background/> [https://perma.cc/H8EH-4D4G].

<sup>139</sup> *Technical Guidance 364.021*, MINN. DEP’T HUM. RTS., [https://mn.gov/mdhr/assets/Technical\\_Guidance\\_364.021\\_tcm1061-213501.pdf](https://mn.gov/mdhr/assets/Technical_Guidance_364.021_tcm1061-213501.pdf)

In addition, for many, a pardon extraordinary is a symbol of the reform they have made in their lives.<sup>140</sup> A pardon extraordinary is recognition from three of the highest-ranking officials in Minnesota that someone convicted of a crime has turned their life around.<sup>141</sup> Contrary to what many may think, a pardon does not necessarily imply that the underlying conviction is invalid.<sup>142</sup> More often, it is recognition of the individual's post-conviction rehabilitation.<sup>143</sup> Much of what a post-conviction pardon does is lessen the psychological stigma for an individual convicted of a crime.<sup>144</sup> After receiving his pardon extraordinary from the Minnesota Board of Pardons, former convict Seth Evans commented, "I know that God has forgiven me for the things I have done, but I feel that finally the state of Minnesota has forgiven me and I don't have to keep going back into those boxes and look at that person."<sup>145</sup> This forgiveness from the state is an important part of pardons extraordinary for many.<sup>146</sup>

### *B. Pardons Are an Important Part of Our Criminal Justice System*

The use of pardon power is an essential element of mercy within the American criminal justice system.<sup>147</sup> Pardoning individuals for the crimes they have committed has ancient, historical roots.<sup>148</sup> Clemency has been around since the code of Hammurabi and classical Rome.<sup>149</sup> This process was used in English common law and, from there, incorporated into the text of the United States Constitution.<sup>150</sup> The framers of the United States Constitution were explicit in connecting the pardon power with notions of mercy.<sup>151</sup> Alexander Hamilton wrote that the president had the unfettered

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[<https://perma.cc/E7CF-JSS3>]. This law actually encourages more discriminatory conduct by employers by encouraging racial discrimination. It is likely that many employers use race as a substitute for direct information about criminal background. D.J. Tice, *So You Banned the Box: How Did That Work Out?*, STAR TRIB. (Minneapolis) (May 25, 2018), <https://www.startribune.com/so-you-banned-the-box-how-did-that-work-out/483744171/> [<https://perma.cc/9LJ7-M3DY>].

<sup>140</sup> Mannix & Bierschbach, *supra* note 32.

<sup>141</sup> *Id.*

<sup>142</sup> Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 33 (2005).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> Stephen Montemayor, *Gov. Tim Walz Weighs Changes to State Pardon System*, STAR TRIB. (Minneapolis) (Mar. 31, 2020), <https://www.startribune.com/gov-tim-walz-weighs-changes-to-state-pardon-system/569270562/> [<https://perma.cc/6DTK-5TXG>].

<sup>146</sup> *Id.*

<sup>147</sup> Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 1 (2015).

<sup>148</sup> Morison, *supra* note 142.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 39 (Austin Sarat & Nasser Hussain eds., 2007).

power to dispense “the mercy of government” so that justice did not appear too “sanguinary and cruel.”<sup>152</sup>

At the Constitutional Convention, James Iredell argued that pardons were necessary because a person may violate the law, “yet peculiar circumstances . . . may entitle him to mercy.”<sup>153</sup> Pardons and commutations of sentences have historically been described by jurists as based on principles of mercy.<sup>154</sup> As Chief Justice John Marshall remarked in 1833, “[a] pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”<sup>155</sup> Thus, mercy-based clemency has historical and philosophical roots in the American criminal justice system.<sup>156</sup> While some argue that mercy should be left entirely to philosophers or theologians, it is difficult to ignore the important role mercy plays in our criminal justice system.<sup>157</sup>

Additionally, pardons play an important political role by signaling issues within our criminal justice system.<sup>158</sup> The Framers intended pardons to not only be rooted in mercy, but also to assist in balancing between the branches of the government.<sup>159</sup> Out of political motivations, legislators are more prone to create harsh sentences for crimes.<sup>160</sup> Politicians are prone to react to the public and the media in response to crime.<sup>161</sup> The pardon power brings some balance to these tough sentences.<sup>162</sup> Pardons send political messages to both the legislative and judicial branches about good criminal justice policy.<sup>163</sup> This influence is incredibly important to maintaining a fair and balanced system.<sup>164</sup> For all of the above reasons, pardons play a crucial role in our criminal justice system and in the lives of those that seek a grant of clemency.

## V. THE PROBLEMS THAT PLAGUE THE USE OF THE PARDON POWER IN MINNESOTA

Historically, the Minnesota Board of Pardons granted pardons regularly and frequently.<sup>165</sup> Pardons and commutations were even regularly

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *United States v. Wilson*, 32 U.S. 150, 150 (1833).

<sup>156</sup> *Kobil*, *supra* note 151.

<sup>157</sup> *Id.*

<sup>158</sup> *Barkow & Osler*, *supra* note 147.

<sup>159</sup> *Id.* at 17.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 18.

<sup>163</sup> *Id.* at 11.

<sup>164</sup> *Barkow & Osler*, *supra* note 147, at 18.

<sup>165</sup> *Mannix & Bierschbach*, *supra* note 32.

granted to both violent and non-violent offenders alike.<sup>166</sup> From 1940 to 1989, the Board granted eighty-seven percent of all applications for pardons and commutations.<sup>167</sup> Additionally, pardons extraordinary were granted for nearly every single applicant who applied for one.<sup>168</sup> Pardons extraordinary were denied only six percent of the time during this period.<sup>169</sup> Pardons and pardons extraordinary were granted even in cases involving murder, robbery, and sexual abuse.<sup>170</sup>

Since then, the process has shifted dramatically. Only about a third of pardons extraordinary are granted a year.<sup>171</sup> Additionally, pardons extraordinary are only granted to individuals who committed non-violent crimes and waited at least a decade before applying.<sup>172</sup> In 2015, Governor Mark Dayton remarked that the Board would not consider a pardon for somebody accused of sexual assault.<sup>173</sup> Dayton commented, “The statute and the rules don’t prevent them from applying, so it comes down to us to say we are not going to consider that, basically, ‘Don’t come back.’”<sup>174</sup> This is a substantial change from the days when the Board regularly granted pardons extraordinary for almost any applicant, including those convicted of violent crimes.<sup>175</sup>

#### *A. The Procedural Issues with Minnesota’s Pardoning Process*

The decline in pardons in Minnesota reflects greater trends in other

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (citing data from the Minnesota Department of Corrections).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> Ruben Rosario, *Does Minnesota ‘Have a Compassion Problem’ When Issuing Pardons?*, ST. PAUL PIONEER PRESS (Minn.) (Dec. 9, 2018), <https://www.twincities.com/2018/12/09/rosario-too-few-pardons-in-minnesota-even-less-than-alabama-time-for-change/> [https://perma.cc/GJH4-YG5A].

<sup>172</sup> Restoration of Rts. Project, *supra* note 47.

<sup>173</sup> Mannix & Bierschbach, *supra* note 32.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* The possibility of re-offense continues to be something that Board members are frequently concerned about. *See id.* During his time on the Board of Pardons, Governor Mark Dayton expressed concern about the possibility of those who are granted pardons reoffending. He stated, “[n]o matter how careful you are or how careful all three of you are, and the whole scrutiny that went into it before, there’s always that risk that somebody could go out and reoffend, and God forbid reoffend more severely.” *Id.* Former Governor Tim Pawlenty did have a pardon applicant reoffend. *Id.* In 2010, a Blue Earth County prosecutor charged Jeremy Giefer with sexually abusing his daughter more than 200 times. *Id.* In 2007, Pawlenty and the Board of Pardons had granted Giefer a pardon extraordinary for Giefer’s 1994 statutory rape conviction, in part because Giefer had married the victim and raised a child with her. *Id.* The timing of Giefer’s re-offense looked particularly bad at the time because Pawlenty was running for president, and part of his legacy as governor was being tough on sex offenders. *Id.*

states and with the federal government.<sup>176</sup> In the 1980s, criminal justice reform was focused on getting tough on crime.<sup>177</sup> Following a push from Congress for harsher sentences, the rate of federal clemency dropped.<sup>178</sup> Minnesota followed with similar tough-on-crime measures in the 1980s.<sup>179</sup> Minnesota became the first state to adopt legally binding sentencing guidelines.<sup>180</sup> These guidelines provide judges with much less discretion on individual cases.<sup>181</sup> Additionally, Minnesota got rid of its parole board in exchange for supervised release.<sup>182</sup> Following these reforms, there was a decline in the number of pardons granted.<sup>183</sup>

A number of regulations imposed on Minnesota's pardoning process create procedural issues for those seeking a grant of clemency. One reason for the shift in the use of pardoning power in Minnesota is due to statutes passed by the Minnesota Legislature in 1992 that make it significantly more difficult for applicants to apply for a pardon.<sup>184</sup> Research during this time period indicated that more than fifty percent of convicted individuals released from prison were arrested for a new felony or gross misdemeanor in Minnesota within three years of their release.<sup>185</sup> Faith in the pardoning system waned, and legislators found that there was more to lose than gain when individuals were granted pardons.<sup>186</sup> This led the Minnesota

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<sup>176</sup> See Aliza B. Kaplan & Venetia Mathew, *The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon*, 23 LEWIS & CLARK L. R., 1285, 1308 (2020).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1310. "Just prior to the Sentencing Reform Act passing in 1984, President Carter granted full pardons to 33% of the petitions he received, which was a lower percentage than many of his recent predecessors such as President Nixon at about 51% and President Ford at 39%. As the president who signed the Act, Ronald Reagan granted full pardons to about 19% of petitions received during his eight years in office. President George H.W. Bush granted pardons to about 10% of petitions received. President Clinton granted full pardons to about 20% of petitions received and President George W. Bush granted full pardons to only 7.5% of petitions. In President Obama's first term, he granted an even lower rate than his predecessor." *Id.*

<sup>179</sup> Mannix & Bierschbach, *supra* note 32.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Recidivism of Minnesota Felons*, OFF. OF THE LEGIS. AUDITOR STATE OF MINN. (Jan. 1997), <https://www.auditor.leg.state.mn.us/ped/pedrep/9701-ch3.pdf> [<https://perma.cc/A2SR-QBGK>]. "Overall, we found that about 59 percent of the offenders released from prison in 1992 were arrested for a new felony or gross misdemeanor in Minnesota within three years, and an additional 5 percent were rearrested for a felony or gross misdemeanor outside of Minnesota during the three-year follow-up period. During the three years, 45 percent were convicted of a new offense in Minnesota, and 40 percent were imprisoned for new offenses or technical violations of their supervised release." *Id.*

<sup>186</sup> Mannix & Bierschbach, *supra* note 32. In addition, national attention was brought to

Legislature to put substantially more requirements on the pardoning process in an effort to reduce these negative consequences.<sup>187</sup>

The Minnesota Legislature created new procedural and substantive requirements for pardon applicants in 1992.<sup>188</sup> The legislature added the requirement that individuals convicted of crimes of violence must be crime-free for a minimum of ten years prior to applying.<sup>189</sup> Additionally, non-violent offenders were required to be crime-free for a minimum of five years.<sup>190</sup> In addition to these added requirements, the Minnesota Legislature removed a benefit of the pardon extraordinary.<sup>191</sup> No longer would an applicant's record be sealed once they were granted a pardon extraordinary.<sup>192</sup> Even after receiving a pardon extraordinary, the crime would remain on the applicant's criminal history.<sup>193</sup> Finally, the legislature added the requirement that an applicant must be in "good character and reputation" to be eligible to apply.<sup>194</sup> These procedural changes are one of the reasons grants of clemency are so rare in Minnesota today.

Changes to the application process for pardons have made the process difficult and rigorous, which may deter many individuals from completing an application.<sup>195</sup> Applications have steadily dropped since the 1980s.<sup>196</sup> In the 1980s, 522 applicants went before the Board.<sup>197</sup> From 1990 to 1999, the Board heard applications from 365 individuals.<sup>198</sup> From 2000 to 2010, the Board only heard 224 applications.<sup>199</sup> This is a fifty-seven percent decrease from the 1980s.<sup>200</sup>

To apply for a pardon, an applicant must fill out a lengthy application.<sup>201</sup> The applicant must describe, in detail, their conviction, their

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clemency issues when in 1986, the Massachusetts Department of Correction granted Willie Horton a furlough from prison. *Id.* Horton was in prison for killing a gas station attendant during a robbery. *Id.* When Horton's furlough was over, he did not return to prison and subsequently raped a woman at gunpoint and beat her fiancé. *Id.* This brought to the attention of many the potential dangers of releasing violent offenders from prison. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Application for Pardon Extraordinary*, MINN. BD. OF PARDONS, [https://mn.gov/doc/assets/APPLICATION-PARDON%20EXTRAORDINARY\\_tcm1089-361195.pdf](https://mn.gov/doc/assets/APPLICATION-PARDON%20EXTRAORDINARY_tcm1089-361195.pdf) [https://perma.cc/ARD6-ZR2B].

<sup>195</sup> Mannix & Bierschbach, *supra* note 32.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Minn. Bd. of Pardons, *supra* note 194.

previous applications for pardons, and their criminal history.<sup>202</sup> If an applicant fails to disclose any portion of their criminal history, the Board of Pardons may view this as a failure to disclose an applicant's criminal record.<sup>203</sup> The applicant then must detail their current and past employment and education.<sup>204</sup> In addition, the applicant must detail all of the steps they have taken to improve themselves since their conviction.<sup>205</sup> This may include community service, volunteer activities, support groups, and service to family members.<sup>206</sup> The applicant must also explain to the Board why they deserve a pardon and what a pardon would help them accomplish.<sup>207</sup> Applicants should also arrange witnesses to speak on their behalf as well as up to three letters of recommendation.<sup>208</sup>

Once submitted, the application will go through a rigorous background check to ensure that the information on the application is correct.<sup>209</sup> The Commissioner of Corrections will reject all applications that are not eligible according to the criteria.<sup>210</sup> The information in the application is checked against other records such as "records from prison, probation or supervised release, courts, and driving records."<sup>211</sup> The Bureau of Criminal Apprehension ("BCA") and Federal Bureau of Investigation ("FBI") will then verify that the applicant has been crime-free.<sup>212</sup> The Department of Corrections will also publish notice in a newspaper in the county the applicant was convicted, indicating the applicant's crime, conviction date, and that the applicant is now seeking a pardon extraordinary.<sup>213</sup>

This process is intimidating and difficult for applicants. Those that qualify may not even know how to begin the process without the assistance of an attorney.<sup>214</sup> Individuals who qualify for a pardon extraordinary often do not even know the process exists.<sup>215</sup> Governor Tim Walz found that the pardon process was in serious need of reform when at his first Board of

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<sup>202</sup> *Id.*

<sup>203</sup> *Id.* Applicants must include all convictions they have received since their release. *Id.* This includes even misdemeanor traffic convictions. *Id.* Additionally, while the Board of Pardons only grants pardons for convictions that occur in Minnesota, applicants must include all convictions in other state or countries and all violations of condition of release (including supervised release, conditional release, and parole) in their application to the Board. *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Pardon Board: Application Process*, MINN. DEP'T. CORR., <https://mn.gov/doc/about/pardon-board/application-process/> [https://perma.cc/PP9H-94RT].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Montemayor, *supra* note 145.

<sup>215</sup> *Id.*

Pardons hearing, he and his staff concluded that the way convicts learn about eligibility and apply for pardons is “random.”<sup>216</sup>

For many, the strict application requirements and the lack of information for applicants are primary issues that plague the pardoning process.<sup>217</sup> In addition to this, I argue that the prudential and constitutional issues accompanying the unique structure of the Minnesota Board of Pardons are also largely to blame.

*B. The Constitutional Issues with Minnesota’s Pardoning System*<sup>218</sup>

The power to grant pardons in Minnesota is established by the Minnesota Constitution.<sup>219</sup> Article V, section 7 of the Minnesota Constitution establishes a Board of Pardons consisting of the governor, attorney general, and chief justice of the Minnesota Supreme Court.<sup>220</sup> The Minnesota Constitution states that “[t]he governor in conjunction with the board of pardons has power to grant reprieves and pardons after conviction for an offense against the state except in cases of impeachment.”<sup>221</sup> This process is further regulated by Minnesota Statutes section 638.02, which says that pardons cannot be granted unless there is “a unanimous vote of the board duly convened.”<sup>222</sup> This, in effect, gives each member of the Board absolute veto power over every pardon application.<sup>223</sup> The structure of the Board and the unanimous vote requirement create constitutional issues that burden our pardoning system.

By requiring a unanimous vote by the Board of Pardons to grant a pardon, section 638.02 violates the separation of powers among the branches of the government required by the Minnesota Constitution.<sup>224</sup> Separation of powers among the three branches of the Minnesota government is an essential part of our governing system. Article III, section 1 of the Minnesota Constitution states that “[t]he powers of government shall be divided into three distinct departments: legislative, executive and judicial.”<sup>225</sup> Each branch of Minnesota’s government is separate and

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> In this paper, constitutional issues with the Minnesota Board of Pardons refers to issues with the Minnesota Constitution, not the United States Constitution.

<sup>219</sup> MINN. CONST. art. V, § 7.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> MINN. STAT. § 638.02, subdiv. 1 (2020).

<sup>223</sup> *See id.* By requiring a unanimous vote, each member of the Board has the power to unilaterally reject an applicant’s application. *Id.* Even if a majority of the Board agrees to grant a pardon, one vote against the applicant dismisses the application. *See id.*

<sup>224</sup> *See* MINN. STAT. § 638.02 (2020); *see also* MINN. CONST. art. III, § 1.

<sup>225</sup> MINN. CONST. art. III, § 1.

independent of the other branches.<sup>226</sup> No single department can exert control over any other department in the exercise of its official duties prescribed by the Minnesota Constitution.<sup>227</sup>

Furthermore, the Minnesota Legislature cannot change the form of government created by the Minnesota Constitution if it would destroy the independence of any department or allow one department to control another department's exercise of its powers.<sup>228</sup> Unlike the United States Constitution, separation of powers is not only a principle that guides the structure of the Minnesota Constitution, it is expressly provided for within the Minnesota Constitution.<sup>229</sup> Article III, section 1, explicitly requires that “[n]o person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.”<sup>230</sup>

Additionally, the pardon power has traditionally belonged to the Executive Department. The pardon power is listed under article V of the Minnesota Constitution, “the Executive Department.”<sup>231</sup> This article of the Minnesota Constitution lists all the powers of the governor, lieutenant governor, and executive officers.<sup>232</sup> The only section of article V of the Minnesota Constitution that grants power to another branch of the government is section 7, conferring pardon power upon the Board of Pardons.<sup>233</sup>

Historically, the pardon power in Minnesota was solely vested in the governor.<sup>234</sup> This power was taken away in 1897<sup>235</sup> through a legislatively referred amendment to the Minnesota Constitution.<sup>236</sup> A legislatively

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<sup>226</sup> *State ex rel. Birkeland v. Christianson*, 179 Minn. 337, 339–340, 229 N.W. 313, 314 (Minn. 1930) (“The three departments of state government, the legislative, executive, and judicial, are independent of each other. Neither department can control, coerce, or restrain the action or nonaction of either of the others in the exercise of any official power or duty conferred by the Constitution, or by valid law, involving the exercise of discretion.”).

<sup>227</sup> *Id.* Separation of powers is not necessarily absolute division of governmental functions. *See Holmberg v. Holmberg*, 588 N.W.2d 720, 723 (Minn. 1999) (“The separation of powers doctrine is based on the principle that when the government’s power is concentrated in one of its branches, tyranny and corruption will result.”).

<sup>228</sup> *State ex rel. Birkeland*, 179 Minn. at 340, 229 N.W. at 314.

<sup>229</sup> *See* MINN. CONST. art. III, § 1.

<sup>230</sup> *Id.*

<sup>231</sup> *See id.* at art. V.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at § 7.

<sup>234</sup> MINN. CONST. of 1857 art. V, § 4. The 1857 Minnesota Constitution provided that the “governor shall have power to grant reprieves and pardons after convictions against the State.” *Id.* This vested the pardoning power solely in the hands of the governor. *See id.*

<sup>235</sup> 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4).

<sup>236</sup> *State Constitutional Amendments Considered*, MINN. LEGIS. REFERENCE LIBR., <https://www.leg.mn.gov/lrl/mngov/constitutionalamendments> [https://perma.cc/KL6N-54BB].

referred constitutional amendment is a referendum that appears on a state's ballot as a ballot measure after the legislature has proposed a constitutional amendment and passed a bill to put the amendment before the voters of the state.<sup>237</sup> The Minnesota Legislature proposed to take away the sole pardoning power from the governor through one of these referendums.<sup>238</sup> The amendment was intended to take the sole pardon power away from the governor by giving the governor pardon power only "in conjunction with the board of pardons."<sup>239</sup> Out of 337,229 voters, 130,354 were in favor of the amendment, and 45,097 were opposed.<sup>240</sup> With this vote, the Minnesota Constitution was amended, and the governor no longer possessed sole pardoning power.<sup>241</sup>

This amendment materially altered the pardon power under the Minnesota Constitution by conferring a power that was historically reserved for the Executive Department upon the Board of Pardons.<sup>242</sup> Pardoning power has traditionally been considered an executive function. Despite the Board of Pardons wielding pardoning power since 1897, pardoning power has continued to be considered an executive function in Minnesota. In 1949, the Minnesota Supreme Court recognized that pardons are an executive function.<sup>243</sup> In *State v. Meyer*, the Minnesota Supreme Court found that "a pardon is [an] exercise of executive clemency."<sup>244</sup> Not only is pardoning power traditionally considered an executive function in Minnesota, but it is also recognized throughout the country as a power typically belonging to the executive.

In 1833, Chief Justice John Marshall described pardons as "an act of grace, proceeding from the power intrusted [sic] with the execution of the laws."<sup>245</sup> In *Ohio Adult Parole Authority v. Woodard*, the Supreme Court

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<sup>237</sup> *Legislatively Referred Constitutional Amendment*, BALLOTPEdia, [https://ballotpedia.org/Legislatively\\_referred\\_constitutional\\_amendment](https://ballotpedia.org/Legislatively_referred_constitutional_amendment) [https://perma.cc/H3B7-KPM8].

A legislatively referred constitutional amendment is a limited form of direct democracy in comparison with an initiated constitutional amendment. *Id.* With an initiated constitutional amendment, the voters propose the amendment and approve it. *Id.* In this case, the voters did not propose the amendment to the Minnesota Constitution, the Minnesota Legislature did. *See* MINN. LEGIS. REFERENCE LIBR., *supra* note 236.

<sup>238</sup> 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4).

<sup>239</sup> *Id.*

<sup>240</sup> Minn. Legis. Reference Libr., *supra* note 236.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *State v. Meyer*, 228 Minn. 286, 301, 37 N.W.2d 3, 13 (Minn. 1949) (finding that "laws vesting in administrative boards the authority to determine how a convict should be handled after conviction interfere with the pardoning power vested in the executive or a pardon board most frequently stems from the failure to distinguish between a pardon or reprieve and a parole or probation.").

<sup>244</sup> *Id.*

<sup>245</sup> *United States v. Wilson*, 32 U.S. 150, 160 (1833) ("The power of pardon, in criminal cases,

stated that “the clemency and pardon powers are committed, as is our tradition, to the authority of the executive.”<sup>246</sup> In *Connecticut Board of Pardons v. Dumschat*, the Court held that “pardon and commutation decisions have not traditionally been the business of courts.”<sup>247</sup> Despite the continued acknowledgment that pardons are traditionally an executive function and not a function of the judicial branch, the Minnesota Board of Pardons involves the judicial branch by making the head of the judicial branch a member of the board with absolute veto power.<sup>248</sup> Additionally, the text of the Minnesota Constitution vests the pardoning power in the governor “in conjunction with” the Board of Pardons.<sup>249</sup> This implies that the power is still vested with the governor but adds a requirement that the governor must consult with the other members of the Board.<sup>250</sup> Minnesota Statutes section 638.02 is inconsistent with the language of the Minnesota Constitution by turning a mere consultation with the Board into a requirement for a unanimous vote.<sup>251</sup> That unanimous vote in effect gives both the attorney general and the chief justice absolute veto power.<sup>252</sup> This is inconsistent with the text of the Minnesota Constitution by giving the other members of the Board equal footing with the governor.<sup>253</sup> This was Judge Laura Nelson’s conclusion in her ruling in Amreya Shefa’s lawsuit against the Board of Pardons.<sup>254</sup>

Ruling in favor of Shefa and Governor Walz’s challenges to the constitutionality of the Board of Pardons, Judge Laura Nelson found that because Minnesota Statutes section 638.01 and section 638.02, subdivision 1 do not give effect to the language “the Governor in conjunction with,” these statutes are unconstitutional.<sup>255</sup> Judge Nelson found that the plain language of article V, section 7, names the governor “separate and apart from the Board of Pardons, of which he is a member.”<sup>256</sup> Based on this plain language, and applying the canon against surplusage, Judge Nelson agreed that the Minnesota Constitution confers some pardon power upon the

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has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance.”).

<sup>246</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998).

<sup>247</sup> *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981).

<sup>248</sup> See MINN. CONST. art. V, § 7; see also MINN. STAT. § 638.02 (2020).

<sup>249</sup> MINN. CONST. art. V, § 7.

<sup>250</sup> Mark Osler, *A New Pardons Process Would Nix Drama, Meet Constitutional Standard*, STAR TRIB. (Minneapolis) (Oct. 11, 2019), <https://www.startribune.com/a-new-pardons-process-would-nix-drama-meet-constitutional-standard/562859252/> [https://perma.cc/2FJY-SRLG].

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> See *Shefa v. Ellison*, No. 62-CV-20-4090, 2021 WL 3440678 (Minn. Dist. Ct. July 2, 2021).

<sup>255</sup> *Id.* at \*6.

<sup>256</sup> *Id.*

governor separate from the Board of Pardons.<sup>257</sup> This makes the second sentence of Minnesota Statutes section 638.01 and Minnesota Statutes section 638.02, subdivision 1, which give pardon power to the Board of Pardons alone, unconstitutional.<sup>258</sup> The Minnesota Supreme Court rejected this interpretation, holding that both statutes that govern the Board of Pardons are constitutional.<sup>259</sup>

Furthermore, if the Minnesota Legislature intended for the Minnesota Constitution to require a unanimous vote by the Board, the Minnesota Constitution would likely have been amended to require the “advice and consent” of the other board members.<sup>260</sup> This is a term used at both the federal and state level in constitutions when drafters intend for there to be consultation with a secondary party over a decision.<sup>261</sup> If the lawmakers wanted the governor to receive consent from the attorney general and the chief justice on the granting of pardons, then the Minnesota Constitution would reflect that.<sup>262</sup> However, the drafters did not do that, implying that the power is still vested in the governor as the head of the executive department.<sup>263</sup>

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<sup>257</sup> *Id.* The canon against surplusage is a canon of construction that favors “giving each word or phrase in a statute a distinct, not an identical, meaning.” *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017).

<sup>258</sup> *Shefa*, 2021 WL 3440678 at \*6.

<sup>259</sup> *Shefa v. Ellison*, 964 N.W.2d 157 (Minn. 2021). At oral arguments Justice G. Barry Anderson expressed skepticism about this argument: “If the Legislature or in the constitutional amendment, the intention had been that the governor’s vote is indispensable it would have said it in the constitutional amendment or said it in the statute,” Justice Anderson said. “It doesn’t say it in either place. We have to get there by implication.” Bakst, *supra* note 120.

<sup>260</sup> *Thonesavanh*, 904 N.W.2d at 437. This is one of the arguments *Shefa* and Governor Walz advanced in their case. See *Shefa* 2021 WL 3440678, at \*4. *Shefa* and Governor Walz further argued that the correct interpretation of article V, section 7 of the Minnesota Constitution would require a pardon to be effective if the governor and one other member of the Board voted in favor of the pardon. *Id.* Judge Nelson refused to address whether this argument was correct, stating that she did not “have the authority to determine how pardons should be granted or the voting procedure amongst those with pardon power.” *Id.*

<sup>261</sup> *Shefa*, 2021 WL 3440678 at \*4.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* While the argument about the interpretation of the Board of Pardons clause has merit, one issue with this argument is that pardoning power was intentionally taken away from the governor in 1897 through a legislatively referred constitutional amendment referendum. 1895 Minn. Laws ch. 2, §1 (codified at MINN. CONST. of 1897 art. V, § 4). Critics of the current interpretation of the power vested to the Board of Pardons claim that the unanimous vote requirement oversteps the “in conjunction with” requirement of the Minnesota Constitution by denying the governor their constitutionally conferred power to pardon. MINN. CONST. art. V, § 7. This argument, however, ignores that the pardoning power was intentionally taken from the governor through an amendment to the Minnesota Constitution. See MINN. LEGIS. REFERENCE LIBR., *supra* note 236. Article V, section 7 of the Minnesota Constitution states that the Board’s “powers and duties shall be defined and regulated by law.” MINN. CONST. art 5, § 7. This expressly states that the Board is subject to statutory regulations and limitations. *Id.*

*C. Prudential Issues with the Board of Pardons*

In addition to the ways in which the current pardoning system is inconsistent with the text and structure of the Minnesota Constitution, there are also prudential considerations. While constitutional arguments contend that the structure of the Board of Pardons and the unanimous vote requirement under Minnesota Statutes section 638.02 violate the Minnesota Constitution, prudential arguments assert policy considerations. The argument here is that the current structure of the Board of Pardons, which puts all grants of clemency in the hands of the chief executive, attorney general, and the chief supreme court justice, is unwise policy.

*1. It Is Not Wise to Vest All Pardons in the Hands of the Top Officials in Minnesota State Government.*

The Minnesota Constitution vests pardoning power in three of the most powerful individuals in the state of Minnesota: the governor, attorney general, and chief justice of the Minnesota Supreme Court.<sup>264</sup> Leaving this process to three of the busiest people in Minnesota creates a “bottleneck problem” that slows the process for anyone seeking a pardon.<sup>265</sup> The Board of Pardons is one of the many powerful jobs these officials are tasked with.<sup>266</sup> Pardon applications are heard infrequently—only two times a year by the governor, attorney general, and chief justice.<sup>267</sup> These three officials have little time to devote to granting pardons.<sup>268</sup> Because of the limited amount of time the Board has, only a few cases can be heard every year.<sup>269</sup> Between

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<sup>264</sup> MINN. CONST. art. V, § 7.

<sup>265</sup> Montemayor, *supra* note 145 (quoting DFL State Representative from Minneapolis, Jamie Long).

<sup>266</sup> Under the Minnesota Constitution, the governor is the head of the executive branch in Minnesota. *See* MINN. CONST. art. V, § 3 (“[The governor] is the commander-in-chief of the military and naval forces and may call them out to execute the laws, suppress insurrection and repel invasion.”). The governor is also tasked with appointing notaries and other officers. *Id.* The governor appoints commissioners and fills vacancies that occur in the offices of secretary of state, state auditor, attorney general, and other state and district officers. *Id.* “The attorney general is the chief legal officer of the State of Minnesota.” *About Our Office*, THE OFF. OF MINN. ATT’Y GEN. KEITH ELLISON, <https://www.ag.state.mn.us/office/> [<https://perma.cc/37YY-95MW>]. The Attorney General’s Office provides legal representation to state agencies, boards, and commissions and represents the State of Minnesota in state and federal court and administrative hearings. *Id.* The chief justice of the Minnesota Supreme Court is the head of the highest court in Minnesota. *See generally* MINN. CONST. art. VI, § 1. The Minnesota Supreme Court is tasked with hearing appeals as well as functioning as the rule-making body for all of Minnesota’s state courts. *Minnesota Supreme Court*, MINN. JUD. BRANCH, <https://mncourts.gov/SupremeCourt.aspx> [<https://perma.cc/MMJ5-23NQ>]. The Minnesota Supreme Court is also responsible for governing the practice of law in Minnesota. *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Osler, *supra* note 250.

<sup>269</sup> *Id.*

fifteen and thirty cases can be heard each session, resulting in only about sixty cases being heard yearly.<sup>270</sup> Because of this, many applications are denied before they even reach the Board.<sup>271</sup>

Additionally, placing the pardon power exclusively in the hands of such powerful individuals creates a stressful and highly publicized affair for both pardon applicants and victims of crime. All pardon applicants are required to appear before the Board of Pardons at one of the biannual meetings.<sup>272</sup> In addition, the victims of the applicant's crimes are often also asked to appear at the meeting.<sup>273</sup> This makes for a traumatic encounter for all involved.<sup>274</sup> In June of 2019, this was apparent when Thomas Ondov, convicted of raping his niece in 1990, appeared before the Board.<sup>275</sup> Ondov's victim was asked to testify before the Board.<sup>276</sup> She told the Board, "There is no pardon for me. That can never be erased."<sup>277</sup> She went on to say, "I can't erase it and I don't think it should be erased for the person who's responsible for causing me and my entire family so much harm and pain."<sup>278</sup> After taking this testimony, the Board unanimously rejected Ondov's pardon request.<sup>279</sup> Not only are pardon applicants forced to relive their crimes in front of three of the most powerful individuals in Minnesota, so are the victims.<sup>280</sup>

Additionally, the Board members likely contemplate their public image when hearing applications and testimony.<sup>281</sup> During Ondov's case, Attorney General Keith Ellison commented, "[t]he offense is sort of what really has me hung up, I'm really worried about what signal we might send to victims and to the community at large."<sup>282</sup> The public perception of these three officials granting pardons to offenders, particularly violent offenders, will continue to restrict the Board of Pardons.<sup>283</sup> Perhaps that accountability is a good thing. Some may argue that offenders such as Ondov have

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<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Dana Ferguson, 'There Is No Pardon for Me,' *Woman Tells Tim Walz, Keith Ellison and Lorie Gildea. They Turned Down Her Rapist's Pardon Request*, ST. PAUL PIONEER PRESS (Minn.) (June 25, 2019), <https://www.twincities.com/2019/06/25/there-is-no-pardon-for-me-woman-tells-tim-walz-keith-ellison-and-lorie-gildea-they-turned-down-her-rapists-pardon-request/> [https://perma.cc/4K7R-385P].

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* Ondov gave his victim drugs and alcohol without her knowledge, and he proceeded to kiss, touch and rape her. *Id.* He was convicted of first degree criminal sexual misconduct in 1991 and sentenced to 86 months in prison. *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

committed such violent crimes that they do not deserve mercy from these three officials. However, it remains troubling that public perception may be weighing heavily on the members of the Board when they hear applications and testimony during this process. This, in addition to the busy schedules of all three members of the Board, makes it clear that this job should not be left to three of the highest-ranking officials in Minnesota's government.

*2. The Chief Justice of the Minnesota Supreme Court Should Not Sit on the Board of Pardons.*

Perhaps the most troubling issue with the Minnesota Board of Pardons is that the chief justice of the Minnesota Supreme Court is a member of the Board and wields absolute veto power.<sup>284</sup> Serving in the capacity of their official roles, each member of the Board brings a different insight to the proceedings.<sup>285</sup> There is no doubt that acting in the official capacity as the head of the judiciary, the chief justice brings a particular mindset and framework to the proceedings.

Some may argue that this brings a beneficial separation of powers framework to the Board of Pardons. Current Chief Justice of the Minnesota Supreme Court, Lori Gildea, remarked that "I think the pardon board in the sense that there are three of us working together, and we can be a check and balance on each other and hopefully a help to each other . . . is a good thing."<sup>286</sup> Despite Chief Justice Gildea's beliefs, having a member of the judicial branch on the Board of Pardons may do more harm than good.

Typically, pardons are a grant of executive clemency.<sup>287</sup> Most commonly, on the state level, governors are given the ultimate authority to make clemency decisions because they are the head of the executive branch within the states.<sup>288</sup> In this kind of pardon structure, the governor is usually assisted in the pardoning process by an administrative agency.<sup>289</sup> Some states employ a hybrid system where the clemency power is only exercised by a governor with approval from an administrative board.<sup>290</sup> A few states grant clemency authority to an independent board, with the members being appointed by the governor.<sup>291</sup> It is entirely unique and unusual in Minnesota to have the head of the judiciary sit on the Board of Pardons.<sup>292</sup> If this is wise policy, as Chief Justice Gildea believes, it seems as though at least some

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<sup>284</sup> See MINN. CONST. art. V, § 7; MINN. STAT. § 638.02, subdiv. 1 (2020).

<sup>285</sup> Osler, *supra* note 250.

<sup>286</sup> Montemayor, *supra* note 145.

<sup>287</sup> LOVE, *supra* note 126, at 23.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 28–29.

<sup>291</sup> *Id.* at 23–26.

<sup>292</sup> See generally *50-State Comparison: Pardon Policy & Practice*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> [https://perma.cc/J38B-D9RE].

other states would have adopted a similar approach. And yet, Minnesota is the only state to give its chief justice absolute veto power over grants of clemency.<sup>293</sup>

It is wise public policy to exclude members of the judicial branch from the pardoning process. There are key advantages to vesting the pardon power within the hands of the executive branch.<sup>294</sup> First, “undivided responsibility placed in the hands of the executive encourages a sense of care and scrupulousness in making clemency decisions that might be lost if the responsibility were shared with the courts.”<sup>295</sup> Second, involving a member of the judicial branch is inconsistent with the purpose of grants of clemency.<sup>296</sup> Chief Justice Rehnquist commented on this in *Ohio Adult Parole Authority v. Woodard*.<sup>297</sup> He remarked that the pardon power is intended “to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations.”<sup>298</sup>

The governor and the chief justice go into pardon proceedings with different considerations.<sup>299</sup> The key to the rule of law for judges is to apply the law evenly and fairly.<sup>300</sup> Judges must make legal proceedings clear and transparent and balance the rights of all individuals.<sup>301</sup> While fair application of the law to the facts is an important hallmark of judicial decision-making, pardons are supposed to be an executive act of mercy by the government.<sup>302</sup> Clemency is about forgiveness and grace.<sup>303</sup> It is an exception to the strict enforcement of criminal laws.<sup>304</sup> When granting a pardon, more than just the law and the facts of the crime must be considered.<sup>305</sup> Clemency is about looking into the defendant’s circumstances and considering whether they deserve to be legally and morally released from the burdens imposed because of their crimes.<sup>306</sup> A judge, particularly the head of the judiciary, should not take part in this process.

This issue is particularly relevant when looking at Amreya Shefa’s case.

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<sup>293</sup> *Id.*

<sup>294</sup> Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 704 (2012).

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 273 (1998).

<sup>298</sup> *Id.* at 280–81.

<sup>299</sup> Osler, *supra* note 250.

<sup>300</sup> *Judges Explain Rule of Law, Why It Matters*, U.S. CTS. (Aug. 8, 2019), <https://www.uscourts.gov/news/2019/08/08/judges-explain-rule-law-why-it-matters#:~:text=Key%20to%20the%20rule%20of,against%20the%20safety%20of%20others> [https://perma.cc/5ESV-DSXV].

<sup>301</sup> *Id.*

<sup>302</sup> Morison, *supra* note 142, at 4.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

Both the Governor and the Attorney General voted in favor of her pardon.<sup>307</sup> Governor Walz and Attorney General Ellison heard her story of abuse and were compelled to take this into account when considering whether to forgive Shefa for her crime.<sup>308</sup> It was Chief Justice Gildea who was responsible for the denial of Shefa's pardon.<sup>309</sup> Chief Justice Gildea said she could not support the pardon because "[t]he crime caused the death of a person, so it's on that basis that I don't support Ms. Shefa's pardon application."<sup>310</sup> Chief Justice Gildea refused the pardon because Shefa killed her husband.<sup>311</sup> While Chief Justice Gildea's judicial decision-making process makes sense in the context of a court case, different factors must be considered when determining whether to grant an act of grace, such as a pardon. Amreya Shefa committed manslaughter in the heat of passion, and it was not self-defense.<sup>312</sup> But because Shefa's crime resulted in the death of her husband, Chief Justice Gildea did not fully consider the physical abuse Shefa endured at the hands of her husband for years, the time she spent in ICE custody after she served her sentence, and the terrifying ramifications if she were deported back to Ethiopia.<sup>313</sup> Factors like these should be looked at when granting a pardon. A pardon is about mercy and forgiveness for the defendant's crimes, and the chief justice, acting in their official capacity on the Board of Pardons, is not a good fit for this role. It is unwise to allow the head of the judiciary to serve such an important role in grants of clemency in Minnesota.

## VI. THE SOLUTION TO MINNESOTA'S PARDON PROBLEM

With all of these issues plaguing the Minnesota Board of Pardons, it is important to start working towards a solution. As Attorney General Ellison commented in 2019, "I think we've got some work to do if we're going to consider ourselves a state that is enlightened and believes in creating hope for people who have made serious mistakes."<sup>314</sup> In 2019, State Representative Jamie Long from Minneapolis sponsored a bill to reform the current pardoning system in Minnesota.<sup>315</sup> The bill would have established a Clemency Review Commission in Minnesota.<sup>316</sup>

The commission would consist of nine members, and each would

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<sup>307</sup> Compl. at 2, *Shefa v. Ellison*, No. 52-CV-20-3090 (Minn. Dist. Ct. July 17, 2020).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> Hoffland, *supra* note 91.

<sup>311</sup> See *id.*

<sup>312</sup> *State v. Amreya Rahmeto Shefa*, No. 27-CR-13-39734, 2015 WL 1279762, at \*8 (Minn. Dist. Ct. Jan. 30, 2015).

<sup>313</sup> Sepic, *supra* note 57.

<sup>314</sup> Montemayor, *supra* note 145.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* The Clemency Review Commission is modeled after the pardoning system that South Dakota recently implemented.

serve a four-year term.<sup>317</sup> The commission would meet four times every year.<sup>318</sup> The governor, attorney general, and chief justice would each appoint three members and be responsible for replacing members at the end of their term.<sup>319</sup> The commission would review applications for pardons and commutations before they are considered by the Board of Pardons.<sup>320</sup> The commission would then make a recommendation for each eligible applicant on whether they should be granted a pardon or not.<sup>321</sup> The commission would hear from victims and law enforcement at their meetings which would then assist the commission in making a recommendation to the Board.<sup>322</sup> The commission would make a positive or negative recommendation by majority vote for each petition submitted, with the vote of each commission member reported to the Board of Pardons in writing.<sup>323</sup> Finally, every pardon would be granted by a majority vote of the Board duly convened, and the governor would be required to be within that majority.<sup>324</sup> This would eliminate the unanimous vote requirement, therefore eliminating the absolute veto power of both the attorney general and the chief justice of the Minnesota Supreme Court.<sup>325</sup>

Implementing a Clemency Review Commission would solve a number of the problems that burden the current pardoning system in Minnesota. Unfortunately, the legislative session adjourned prior to the passage of the bill, so Minnesota has yet to implement this reform.<sup>326</sup> Legislators must continue to push for this change to the Board of Pardons. A Clemency Review Commission and the accompanying legal changes to the Board of Pardons would solve many issues that weigh down the current pardoning system. This would remedy the constitutional concerns about separation of powers by utilizing a majority vote by the Board, instead of a unanimous one, to grant pardons.<sup>327</sup> It would remedy the prudential issues by putting a large portion of the decision-making in the hands of the designated Clemency Review Commission.<sup>328</sup> Further, it would relieve some of the procedural strain on the Board by holding four meetings a year, instead of two, as well as by putting the application process into the hands of the

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<sup>317</sup> H.F. 2806, 91st Leg., Reg. Sess. (Minn. 2019).

<sup>318</sup> *Id.* The Board would continue to meet two times per year. *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* With the commission's recommendations, the commission would provide any statement made by the victim of the crime or the law enforcement agency about the applicant's crime. *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

commission prior to reaching the Board.<sup>329</sup> All of these features would improve the pardoning process in Minnesota.

## VII. CONCLUSION

Minnesota's pardon system is in desperate need of reform and rehabilitation. With steadily declining numbers for both applications and grants of clemency, it is clear that this process is becoming more and more difficult for applicants to overcome.<sup>330</sup> This is largely due to the inefficiencies caused by procedural, constitutional, and prudential issues that strain the Board of Pardons.<sup>331</sup>

Procedurally, applicants face a difficult, confusing, and largely inaccessible process that limits the number of pardons that can be granted in a year.<sup>332</sup> Increased regulation of this process has led to inefficiencies.<sup>333</sup> Many of these regulations stem from a declining faith in rehabilitation and a push for tough-on-crime policies by the Minnesota Legislature.<sup>334</sup>

The constitutional issues stem from the Minnesota Legislature taking the power of clemency away from Minnesota's Executive Department through both the legislatively-referred constitutional amendment and the unanimous vote statute.<sup>335</sup> Additionally, not only are convicted persons in Minnesota subject to the will of the governor, but they must also face the attorney general and chief justice of the Minnesota Supreme Court when they apply for a pardon.<sup>336</sup> Furthermore, the unanimous vote requirement is inconsistent with the text and structure of the Minnesota Constitution.<sup>337</sup>

Finally, Minnesota's current pardon process is riddled with prudential issues.<sup>338</sup> It is unwise to give complete responsibility for this power to the state's three highest ranking officials.<sup>339</sup> Not only are these individuals extraordinarily busy, but as they act in their official capacities on the Board, it is clear that they will consider the image they project in their official role when they decide grants of clemency.<sup>340</sup>

It is even more unwise to allow the chief justice of the Minnesota Supreme Court, the head of the judicial branch, to take part in this process.<sup>341</sup> The judicial branch should stay out of this process entirely; its

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<sup>329</sup> *Id.*

<sup>330</sup> *See supra* Part V.A.

<sup>331</sup> *See supra* Part V.

<sup>332</sup> *See supra* Part V.A.

<sup>333</sup> *See supra* Part V.A.

<sup>334</sup> *See supra* Part V.A.

<sup>335</sup> *See supra* Part V.B.

<sup>336</sup> *See supra* Part V.B.

<sup>337</sup> *See supra* Part V.B.

<sup>338</sup> *See supra* Part V.C.

<sup>339</sup> *See supra* Part V.C.

<sup>340</sup> *See supra* Part V.C.

<sup>341</sup> *See supra* Part V.C.

role has been completed after the conviction was served.<sup>342</sup> Clemency is intended to be an executive act of mercy.<sup>343</sup> Those that grant pardons must consider not just the law and the facts of the crime, but also additional circumstances.<sup>344</sup> Acting in their official capacity, the chief justice of the Minnesota Supreme Court brings a judicial lens that does not belong in the pardoning process.<sup>345</sup>

There is a solution to these problems.<sup>346</sup> A Clemency Review Commission, as proposed to the Minnesota Legislature in 2019, would remedy many of these issues.<sup>347</sup> There needs to be an increased effort to pass this legislation.<sup>348</sup> Those deserving of a pardon should not be held back by procedural, constitutional, and prudential inefficiencies. As Alexander Hamilton stated in Federalist No. 74, “[h]umanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”<sup>349</sup> In both the interest of public policy and in the humanity of individuals convicted, the state of Minnesota must reform its pardoning process.

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<sup>342</sup> See *supra* Part V.C.

<sup>343</sup> See *supra* Part V.C.

<sup>344</sup> See *supra* Part V.C.

<sup>345</sup> See *supra* Part V.C.

<sup>346</sup> See *supra* Part VI.

<sup>347</sup> See *supra* Part VI.

<sup>348</sup> See *supra* Part VI.

<sup>349</sup> THE FEDERALIST NO. 74 (Alexander Hamilton).