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Criminal Law - Review: Exercising Jurisdiction to Prosecute a Priest for Theft Is Constitutional

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CRIMINAL LAW—REVIEW: EXERCISING JURISDICTION TO PROSECUTE A PRIEST FOR THEFT IS CONSTITUTIONAL

State v. Burckhard,
1998 N.D. 121, 579 N.W.2d 194

I. FACTS

From July 1989 to October 1996, Father Leonard Burckhard was the parish priest for St. Catherine's Church in Valley City, North Dakota, which is within the Fargo Diocese of the Roman Catholic Church.[1] In December 1995, concerns regarding Burckhard's use of parish funds were brought to the attention of the Fargo Diocese by members of the church.[2] The problem came to light after a parishioner, asked by Burckhard to examine the books for the rectory account, became suspicious of discrepancies in the account figures.[3]

On January 4, 1996, Monsignor Wendelyn Vetter, vicar general of the Fargo Catholic Diocese,[4] met with Scott Hoselton, a certified public accountant and fiscal manager of the diocese, and Burckhard to discuss the need for an audit.[5] At the meeting, Vetter instructed Burckhard to cease all personal transactions.[6] Between January and July of 1996, the diocese conducted its audit and obtained copies of bank statements, checks, credit card statements, and invoices from the various institutions involved.[7]

The audit revealed that between 1991 and 1996, approximately $120,000-130,000 in funds were deposited into the rectory account.[8] The audit further revealed that between 1991 and 1994 and in 1996, $82,907 of the funds in the account were used directly for personal expenditures by Burckhard and that an additional $39,107 was used for

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1. State v. Burckhard, 1998 N.D. 121, ¶ 2, 579 N.W.2d 194, 195. James Sullivan was at all relevant times and continues to be the Bishop of the Fargo Diocese. Brief for Appellee at 4, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275). St. Catherine's Church is a North Dakota corporation. *Burckhard*, ¶ 2, 579 N.W.2d at 195.

2. REPORT OF INVESTIGATION FROM THE OFFICE OF THE N.D. ATTORNEY GENERAL, BUREAU OF CRIMINAL INVESTIGATION (No. 960390), at 1 (Nov. 7, 1996) (on file with author) [hereinafter ATTORNEY GENERAL REPORT].

3. Deneen Gilmour, *Bishop Relieves Valley City Priest of His Duties*, FARGO F., Oct. 15, 1997, at A1.

4. *Id.*

5. ATTORNEY GENERAL REPORT, *supra* note 2, at 1-2.

6. ATTORNEY GENERAL REPORT, *supra* note 2, at 1-2. In spite of this instruction, however, Burckhard continued converting funds from the rectory account for his personal use until July 15, 1996. ATTORNEY GENERAL REPORT, *supra* note 2, at 3.

7. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

8. ATTORNEY GENERAL REPORT, *supra* note 2, at 2. These deposits included transfers from other church accounts, Burckhard's personal funds, his food allowances, and other transfers. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

credit card payments without further detail regarding whether the payments were for personal expenses.[9] Burckhard estimated that thirty-three percent of the credit card payments, or $13,057, was used for personal expenses.[10] Therefore, Burckhard admitted that he spent an overall total of $95,964 from the account for his personal use.[11] In addition to the parish funds, Burckhard deposited approximately $26,525 of his own money into the account during the same time period.[12] Thus, Burckhard converted $69,439 of parish funds for personal use.[13]

In September 1996, Burckhard began making restitution transfers from various accounts and securities to St. Catherine's and the diocese.[14] These restitution payments totaled $62,872, leaving an unpaid balance of $6,567.[15]

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9. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

10. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

11. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

12. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

13. ATTORNEY GENERAL REPORT, *supra* note 2, at 2.

14. ATTORNEY GENERAL REPORT, *supra* note 2, at 2. Some of the repayment was possible because Burckhard bought stocks with the converted funds. Gilmour, *supra* note 3, at A1. After discovery of his wrongdoing, the Fargo Diocese ordered Burckhard to turn the stocks over to the church. Gilmour, *supra* note 3, at A1.

15. ATTORNEY GENERAL REPORT, *supra* note 2, at 3. The figures provided in the text are provided in simplified form below:

BURCKHARD'S PERSONAL EXPENDITURES:	
Direct personal expenditures	$82,907
Credit card payments admittedly used for personal expenses	13,057
TOTAL	95,964
BURCKHARD'S CONTRIBUTIONS:	
Personal funds	$26,525
Restitution	62,872
TOTAL	89,379
BALANCE UNPAID BY BURCKHARD:	
Total personal expenditures	$95,964
Total funds contributed	- 89,379
TOTAL	6,567

ATTORNEY GENERAL REPORT, *supra* note 2, at 2-3. The State, however, disputed the accuracy of many of the figures used in the accounting. Appendix to Brief for Appellant at app. 17-18, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275). For example, the State challenged the amount of the restitution payments, arguing that they were made from accounts containing money which had been stolen from the church and suggesting that this should not be considered appropriate restitution. *Id.* at app. 18. Further, the State argued the figures used were inaccurate and underestimated, and that much less of the money was used on legitimate expenses than was reported. *Id.* For example, the State questioned the legitimacy of $17,000 spent on credit card payments for expenses which had a minimal relationship to church business. *Id.* Presumably because of its dissatisfaction with both the accounting of expenses and with the amount of alleged restitution, the State prosecuted Burckhard for theft of property without considering the disputed amount of restitution. *See* Brief for Appellant at 2-4, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275) (stating that the criminal complaint alleged that Burckhard committed theft of over $100,000 but not addressing the issue of alleged restitution).

Additionally, St. Catherine's hired a private accounting firm to conduct an independent audit of the rectory account.[16] Neither St. Catherine's nor the Fargo Diocese filed a civil suit against Burckhard.[17] Burckhard was removed from the parish on October 20, 1996.[18]

In April 1997, the State of North Dakota filed a criminal information against Burckhard, alleging theft of property.[19] The complaint stated that Burckhard knowingly exercised unauthorized control over more than $100,000 in church money, which he spent on various personal expenses with the intent to deprive the church.[20]

Burckhard filed a motion for dismissal in July 1997,[21] pursuant to Rule 12 of the North Dakota Rules of Criminal Procedure.[22] Burckhard had three contentions supporting dismissal:[23] 1) lack of subject matter jurisdiction; 2) that he had "legal" authority over funds under the law of the Roman Catholic Church; and 3) that prosecution was inappropriate, under the precedent of *State v. Brakke,*[24] because a legitimate dispute existed regarding his use of the account.[25] The district court

16. Appendix to Brief for Appellant at app. 33, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275).

17. Gilmour, *supra* note 3, at A1. Incidentally, Burckhard was revered by many church officials, members and staff, particularly for his financial acumen. Gilmour, *supra* note 3, at A1. As an example of his leadership and fund raising ability, Burckhard raised money for a $500,000 renovation of St. Catherine's Church. Gilmour, *supra* note 3, at A1. This renovation was funded entirely and Burckhard additionally built a $237,000 savings account for the church. Gilmour, *supra* note 3, at A1. Additionally, Monsignor Vetter of the Fargo Diocese stated that Burckhard was an excellent administrator. ATTORNEY GENERAL REPORT, *supra* note 2, at 3. Vetter also noted that Burckhard had been diagnosed with manic depression and that perhaps his illness was a reason behind his actions. Gilmour, *supra* note 3, at A1. In another source, however, Vetter is cited as stating that Burckhard was in counseling for obsessive-compulsive disorder. Gilmour, *supra* note 3, at A1. Vetter further said in this source that "Burckhard's disorder involves 'buying things.'" Gilmour, *supra* note 3, at A1.

18. Supplemental Appendix to Brief for Appellee at app. 96, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275) (citing letter from James S. Sullivan, Bishop of Fargo Diocese of the Catholic Church to Robert Hoy, Attorney for Burckhard (July 21, 1997)).

19. Appendix to Brief for Appellant at app. 3, *Burckhard* (No. 970275); *see also* N.D. CENT. CODE § 12.1-23-02(1) (1997) (providing that "[a] person is guilty of theft if he: (1) [k]nowingly takes or exercises unauthorized control over, or makes an unauthorized transfer of an interest in, the property of another with intent to deprive the owner thereof"); N.D. CENT. CODE § 12.1-23-05(2) (1997) (providing, in relevant part, that "theft under this chapter is a class B felony if the property or services stolen exceed ten thousand dollars in value").

20. State v. Burckhard, 1998 N.D. 121, ¶ 2, 579 N.W.2d 194, 195. Examples of the alleged personal expenditures are, among others, payments on personal credit cards, payments to relatives and payments for fishing trips. *Id.*

21. Brief for Appellee at 1, State v. Burckhard, 1998 N.D. 121, 579 N.W.2d 194 (No. 970275).

22. *Burckhard*, ¶ 3, 579 N.W.2d at 195. Rule 12(b) of the North Dakota Rules of Criminal Procedure provides in relevant part that "[a]ny defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion." N.D. R. CRIM. P. 12(b) (1998).

23. *Burckhard*, ¶ 3, 579 N.W.2d at 195.

24. 474 N.W.2d 878, 882 (N.D. 1991).

25. State v. Brakke, 474 N.W.2d 878, 882 (N.D. 1991). *Brakke* involved criminal prosecutions for theft of property and attempted theft of property arising out of the defendant's harvesting of crops from land which he owned before harvest but lost through a partition action prior to harvest. *Id.* at 879.

granted the motion for dismissal on September 2, 1997[26] for lack of subject matter jurisdiction because a determination of the scope of Burckhard's authority over the church funds required an interpretation of religious law or doctrine, a matter left to the church to decide.[27]

On appeal, the North Dakota Supreme Court reversed and remanded the district court's decision on the jurisdictional issue.[28] The court *held* the district court's exercise over prosecution of theft charges against Burckhard does not require excessive government entanglement in religious affairs in violation of either the state or federal constitution.[29] The court further *held* the alternative grounds for dismissal presented by Burckhard were without merit.[30]

II. LEGAL BACKGROUND

State v. Burckhard[31] involves a conflict between church and state. The resolution of such conflicts requires an interpretation of the First Amendment to the United States Constitution.

A. THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion . . . ."[32] This clause, and all of the principles of the First Amendment, are made applicable to the states by the Fourteenth Amendment.[33]

Corresponding to the Establishment Clause, a provision of the North Dakota Constitution specifies that "[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference

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The North Dakota Supreme Court found that a legitimate dispute existed over the right to the crops and held that criminal prosecution was therefore inappropriate. *Id.* at 882. Burckhard argued that the questions involving his authority over the assets of St. Catherine's parish were analogous to the issue of the disputed ownership of the crops in *Brakke*, so that *Brakke* required dismissal. Brief for Appellee at 33-34, *Burckhard* (No. 970275).

26. Brief for Appellee at 4, *Burckhard* (No. 970275).

27. *Burckhard*, ¶ 4, 579 N.W.2d at 195. The district court stated that determination of the scope of authority of a priest would require interpretation of ecclesiastical government, which should be left to the church to resolve. *Id.*

28. *Id.* ¶ 1.

29. *Id.*

30. *Id.* ¶ 39, 579 N.W.2d at 203.

31. 1998 N.D. 121, 579 N.W.2d 194.

32. U.S. CONST. amend. I.

33. Zorach v. Clauson, 343 U.S. 306, 309 (1952); Everson v. Board of Educ., 330 U.S. 1, 15 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Hamilton v. Regents, 293 U.S. 245, 261 (1934). The 14th Amendment, in relevant part, states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Therefore, the Establishment Clause, as a guarantor of religious "liberty," applies to state action through the 14th Amendment. *Everson*, 330 U.S. at 15.

shall be forever guaranteed in this state."[34] The North Dakota Supreme Court has determined that the Establishment Clause and the state constitutional provisions are "[t]o the same effect."[35]

1. *The Development of Civil Court Deference to Decisions of the Church on Ecclesiastical Issues*

The seminal case addressing the limitation of governmental entanglement in ecclesiastical issues is *Watson v. Jones*.[36] Decided in the aftermath of the Civil War, *Watson* involved a property dispute resulting from bitter disagreement over the issue of slavery.[37] From the outbreak of the war, the General Assembly of the Presbyterian Church supported the position of the federal government against the institution of slavery.[38] As a result, the General Assembly declared that whenever any person from a southern state applied to be a minister or member of the church, inquiry would be made regarding that person's loyalty to the government and sentiments on the subject of slavery.[39] The Presbytery of Louisville, Kentucky, which had immediate jurisdiction over a local Presbyterian congregation, the Walnut Street Church, denounced this action of the General Assembly.[40] In response, the General Assembly declared that every Presbytery refusing to obey its order would be dissolved.[41] The congregation of the Walnut Street Church was badly divided over the General Assembly's pronouncement, and a dispute over the ownership of church property ensued.[42]

In resolving the dispute in *Watson*, the United States Supreme Court recognized that the religious organization involved in the dispute was

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34. N.D. CONST. art. I, § 3.

35. Bendewald v. Ley, 168 N.W. 693, 696 (N.D. 1917). The court further stated that civil authorities are prohibited under both the state and federal constitutions from controlling or interfering in purely ecclesiastical matters. *Id.*

36. 80 U.S. (13 Wall.) 679 (1871). *Watson* was a diversity case, decided before the First Amendment had been rendered applicable to the states through the 14th Amendment, based on common law principles regarding the appropriate role of civil courts in resolving religious questions affecting civil rights. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 710 (1976). Additionally, *Watson* predated Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), by many years, and although federal jurisdiction in *Watson* depended solely on diversity, the holding was based on general federal law rather than the state law of Kentucky, as it would have been under *Erie*. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 115-16 (1952).

37. Watson v. Jones, 80 U.S. (13 Wall.) 679, 684 (1871).

38. *Id.* at 690-91.

39. *Id.* at 691.

40. *Id.*

41. *Id.* at 691-92.

42. *Id.* at 692-93. From the outset, the Court rejected the doctrine of English courts, which provides that courts have a duty to inquire and determine the true standard of faith in the church organization and which of the contending parties before the court holds to this standard. *Id.* at 727.

hierarchical in nature.[43] Under such an organizational scheme, property rights are determined neither by the instrument which conveys the property nor by any particular form or worship of religious dogma, but rather by determining the ascertainable congregation, which is entitled to the use of the property.[44] However, the Court recognized that the local congregation is but a member of a much larger religious organization, under its government and control, and bound by its orders.[45] The Court thus held that final decisions of the highest ranks of governing religious bodies are binding on civil courts when addressing questions of ecclesiastical rule, custom, or law, or questions involving discipline or faith.[46] Moreover, the court emphasized that it is the essence of religious organizations, and of their right to govern themselves, that their decisions be binding when dealing with ecclesiastic issues, and such decisions may be appealed only through channels the church itself provides.[47]

Later cases, however, identified appropriate circumstances for the exercise of marginal civil court review of ecclesiastical determinations.[48] Such circumstances include the use of fraud, collusion, or arbitrariness

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43. *Id.* at 726-27. The Court identified three groups into which the questions which had come before the civil courts regarding property rights held by religious bodies could be divided: 1) cases in which the property was given expressly to be used in furtherance of some specific religious doctrine; 2) cases in which property is held by a congregation which is independent of other religious organizations and owes no obligation to any higher authority; and 3) cases in which the property is held by a congregation which is subordinate to some general church organization in which there are superior authorities with a general and ultimate power over the whole membership of the general organization. *Id.* at 722-23. The religious organization involved in *Watson* falls under the third classification. *Id.* at 726. Conforming with the language used in *Watson*, the Court later expressly defined "hierarchical churches" as "those organized as a body with other churches having similar faith and doctrine with a common ruling convocation or ecclesiastical head." Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 110 (1952).

44. *Watson*, 80 U.S. at 726-27.

45. *Id.*

46. *Id.* at 727.

47. *Id.* at 729. Language from *Watson* is often quoted in cases involving governmental review or interpretation of church doctrine, polity, or law, because of its "constitutional ring." Presbyterian Church v. Hull Church, 393 U.S. 440, 446 (1969).

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Watson, 80 U.S. at 728-729.

48. *See Hull Church*, 393 U.S. at 447 (citing Bouldin v. Alexander, 82 U.S. (15 Wall.) 131 (1872)); Brundage v. Deardorf, 55 F. 839 (C.C.N.D. Ohio 1893)).

by church officials.[49] However, unless such circumstances exist, ecclesiastical issues decided by the church must be accepted as conclusive by secular courts, even though those decisions may affect civil rights.[50]

In 1952, the Supreme Court in *Kedroff v. St. Nicholas Cathedral*[51] converted the principle of civil court deference to churches on ecclesiastic issues, first presented in *Watson,* into a constitutional rule based on the Fourteenth Amendment. *Kedroff* involved a New York statute recognizing the administrative autonomy of the Russian Orthodox Churches of North America from the Moscow-based Russian Orthodox Church.[52] The Court invalidated this statute, holding that state legislation which involves the regulation of church administration or operation prohibits the free exercise of religion and thus violates the Fourteenth Amendment.[53]

The Court extended the holding of *Kedroff,* which invalidated intrusive legislative action based on the Fourteenth Amendment, to judicial action in *Kreshik v. St. Nicholas Cathedral.*[54] In *Kreshik,* the Court reversed a judgment of the New York courts which had transferred control of the particular church involved from the governing authority of the Russian Orthodox Church to the Russian Church of America.[55]

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49. Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929). *Gonzalez* involved a dispute over entitlement to income under a will that turned upon an ecclesiastical determination of whether an individual would be appointed to a chaplaincy in the Roman Catholic Church. *Id.* at 4. The Court stated that determination of the essential qualifications of a chaplain, and whether a candidate possesses them, is a function for church authorities because such determinations involve ecclesiastical controversies. *Id.* at 16.

50. *Id.*

51. 344 U.S. 94 (1952).

52. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 97-99 (1952). The Russian Orthodox Church experienced a period of significant turmoil and change in Russia beginning in 1917. *Id.* at 101-02. The patriarch of the church was imprisoned for his counter-revolutionary involvement in the Bolshevik Revolution, and church power changed hands several times. *Id.* at 102. Upheaval in the Russian Church continued for several years, and many Russians found political and religious asylum in America. *Id.* at 102-03. The Russian turmoil made administration of the American diocese very difficult for the Russian Church. *Id.* at 103. Therefore, the Russian Church in 1920 granted the American diocese temporary autonomy until the Russian authority was stabilized. *Id.* During this time and in the years that followed, members of the American diocese became increasingly distant from the Russian Church, and a separatist movement began in the American diocese. *Id.* The orders for temporary autonomy continued until 1945, when the Russian Church in Moscow demanded a reunion with the American Orthodox Church. *Id.* at 105. The American congregations refused this arrangement. *Id.* The New York Legislature in 1945 added an article to the Religious Corporations Law which provided both for the incorporation and administration of Russian Orthodox churches. *Id.* at 97. The purpose of the article was to give the churches administrative autonomy from the governing synod in Moscow. *Id.* at 98.

53. *Id.* at 107-08.

54. 363 U.S. 190 (1960).

55. Kreshik v. St. Nicholas Cathedral, 363 U.S. 190, 191 (1960) (per curiam). *Kreshik* involved an ejectment action to regain possession of St. Nicholas Cathedral in New York City. *Id.* at 190-91. The conflict regarded whether the Archbishop of the North American Archdiocese of the Russian Orthodox Greek Catholic Church, as appointed by the Patriarch of Moscow, was entitled to the use and occupancy of St. Nicholas Cathedral. *Id.* at 190.

2. *The Development of the Doctrine of Neutral Principles of Law*

Sixteen years after *Kedroff*, the Court decided *Presbyterian Church v. Hull Church*.[56] The Court's analysis in *Hull Church* indicated a significant shift in the Court's analytical framework regarding doctrinal disputes.[57] *Hull Church* involved a property dispute resulting from a split in the Presbyterian Church of the United States over the church's official position on issues such as ordination of women ministers, the removal of Bible reading and prayer from public schools and the Vietnam conflict.[58] Consistent with *Watson*, the Court recognized that the resolution of property disputes becomes problematic when the disputes involve "controversies over church doctrine and practice."[59] However, the Court made a significant departure from *Watson* and its progeny by noting that "neutral principles of law" may be applied in property disputes without impermissibly "establishing" churches.[60] Thus, while affirming the rule that civil courts cannot weigh the significance and meaning of religious doctrines as a basis for decisions, the Court in *Hull Church* supported the permissibility of resolutions based on neutral principles.[61] As a result, church property disputes may be resolved based on neutral principles such as the language of deeds, the terms of local church charters, state statutes governing ownership of church property, and the constitutional provisions of the church regarding ownership and control of church property.[62]

In a later case, and in spite of the introduction of the "neutral principles of law" doctrine, the Court appeared to revert to the traditional *Watson* analysis[63] in resolving a religious dispute over the removal and suspension of a bishop and the reorganization of a diocese.[64] The Court

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56. 393 U.S. 440 (1969).

57. *See* John E. Fennelly, *Property Disputes and Religious Schisms: Who is the Church?*, 9 ST. THOMAS L. REV. 319, 325-27 (1997) (noting that the Court's historical analysis in *Watson* and *Kedroff* was replaced by "a much more sanitized analysis" in *Hull Church*, focusing on the property issues that fronted the essential cause of the controversy (religion)).

58. Presbyterian Church v. Hull Church, 393 U.S. 440, 442 n.1 (1969).

59. *Id.* at 445.

60. *Id.* at 449.

61. *Id.* Maryland & Virginia Churches v. Sharpsburg Church, 396 U.S. 367, 370 (1969) (per curiam). This case involved a dispute over ownership and control of church property between the General Eldership of the Churches of God and two secessionist congregations. *Id.* at 367.

62. *Sharpsburg Church*, 396 U.S. at 367.

63. Fennelly, *supra* note 56, at 328.

64. Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 709 (1976). *See also* Fennelly, *supra* note 56, at 328 (discussing the Court's doctrinal reversion in *Milivojevich*). The Mother Church of the Serbian Orthodox Church suspended and eventually removed Dionisije Milivojevich from his position as the bishop of the American-Canadian diocese of the church. *Milivojevich*, 426 U.S. at 697-98. The church then reorganized the American-Canadian diocese into three separate dioceses.

held that resolution of these issues required a detailed inquiry into religious doctrine, an inquiry which was constitutionally prohibited.[65] Additionally, the Court emphasized again that civil courts must accept the decisions of the highest ecclesiastical tribunals of a church as binding when dealing with matters of church polity or law.[66] However, the Court's return to the *Watson* analysis was brief.[67]

In 1978, the Court addressed whether civil courts may resolve church disputes based on neutral principles of law or whether the *Watson* approach, deference to the highest tribunal of the church, precludes its use.[68] The Court determined that the neutral principles approach is not inconsistent with the constitutional principles of *Watson* and that it has several advantages as a basis for analysis.[69] First, the neutral principles approach is wholly secular in operation, yet flexible enough to allow for all variations of religious organization and polity.[70] Next, it relies exclusively on objective concepts of trust and property law.[71] Finally, it frees civil courts from entanglement in inquiries involving religious doctrine, polity, and practice.[72] Thus, states are constitutionally entitled to adopt the neutral principles of law approach as a means of resolving church property disputes.[73]

B. NORTH DAKOTA CIVIL COURTS GIVE DEFERENCE TO DECISIONS OF THE CHURCH ON ECCLESIASTICAL ISSUES

The North Dakota Supreme Court addressed the propriety of civil courts deciding doctrinal questions for the first time in *Bendewald v. Ley*,[74] a 1917 case.[75] *Bendewald* involved a property dispute resulting from a schism in a Lutheran church: One faction of the church had

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Id. at 698. Milivojevich brought a civil action against the church, and the Supreme Court of Illinois held that the actions of the church were defective under the internal regulations of the church. *Id.*

65. *Id.* at 709.

66. *Id.*

67. Fennelly, *supra* note 57, at 330.

68. Jones v. Wolf, 443 U.S. 595, 597 (1979). The Vineville church was a member church of the Augusta-Macon Presbytery of the Presbyterian Church in the United States (PCUS). *Id.* At a congregational meeting of the Vineville Church, the majority voted to separate from the PCUS. *Id.* at 598. The majority notified the PCUS of this decision and then united with another denomination. *Id.* The minority began conducting its activities at a separate location. *Id.* The Augusta-Macon Presbytery conducted an investigation into the dispute and determined that the minority faction constituted "the true congregation of Vineville Presbyterian Church." *Id.* Representatives of the minority faction then brought suit seeking declaratory and injunctive orders establishing their right to exclusive use and possession of the church property. *Id.* at 598-99.

69. *Id.* at 602. The Court, however, recognized the difficulty of the neutral principles approach. *Id.* at 604. The Court cautioned that civil courts using the method must be scrupulous in examining religious documents only in secular terms. *Id.*

70. *Id.* at 603.

71. *Id.*

72. *Id.*

73. *Id.* at 604.

74. 168 N.W. 693 (N.D. 1917).

75. Bendewald v. Ley, 168 N.W. 693 (N.D. 1917).

severed ties with the Missouri Synod of the Evangelical Lutheran Church and adopted the doctrines of the Iowa Synod.[76] The plaintiffs, associating themselves with the Missouri Synod, sought to have the court restrain the defendants from using church property for the purpose of teaching the doctrines of the Iowa Synod and asked the court to declare that the defendants seceded from the church and were no longer members.[77]

The court, without citing any federal or North Dakota authority, determined that civil courts should not assume jurisdiction in cases involving doctrinal or ecclesiastical questions until such questions are resolved by the proper authority within the religious organization.[78] The court recognized that it was being asked to determine the fundamental orthodox doctrines of the Lutheran Church and to determine whether the defendants had departed from principles.[79] Making such determinations, the court held, is not within the power of the civil courts.[80] Additionally, the court identified circumstances under which a civil court determination may be appropriate due to the absence of doctrinal questions.[81]

The court was not confronted with this issue again until 1946.[82] When it did fare the issue, it relied heavily on *Watson,* stating that when ecclesiastical bodies make decisions and interpret their own laws, civil courts cannot interfere with church procedures.[83] The North Dakota Supreme Court did not have occasion to revisit this issue until *Burckhard*, more than fifty years later.

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76. *Id.* at 694.
77. *Id.* at 695.
78. *Id.* at 698.
79. *Id.* at 696.
80. *Id.*
81. *See id.* at 697 (suggesting that a civil court might be able to resolve a dispute involving a deed transferring property to a religious organization where a trust describes how the property is to be used and where there is a diversion of the property to an entirely different use than that expressed in the trust).
82. Presbytery of Bismarck v. Allen, 22 N.W.2d 625 (N.D. 1946). The First Presbyterian Church of Leith was organized and enrolled with the Presbytery of Bismarck in 1910. *Id.* at 627. The General Assembly of the Presbyterian Church in the United States of America (PCUS) loaned the local church money for building costs. *Id.* The local church conducted all of its affairs in accordance with the laws of the PCUS until 1936. *Id.* In 1936, many pastors and members of the PCUS became dissatisfied with the PCUS, and they organized a new denomination, the First Presbyterian Church of America, which was later renamed the Orthodox Presbyterian Church. *Id.* The congregation of the First Presbyterian Church at Leith adopted a resolution renouncing its association with the PCUS. *Id.* The Presbytery of Bismarck sent representatives to Leith to take control of the church, but they were prevented from doing so by defendant members of the congregation. *Id.* at 628.
83. *Id.* at 631.

C. CRIMINAL LIABILITY UNDER THE ESTABLISHMENT CLAUSE

Although the First Amendment protects conduct grounded on religious belief, such conduct is subject to the police power of the government under certain circumstances.[84] For example, First Amendment protection does not extend to fraudulent activities performed in the name of religion.[85] Moreover, whether a clergy member's wrongful conduct violates church policy or canon law does not preclude the conduct from prosecution under secular criminal law.[86] Not only is criminal prosecution permissible under some circumstances, but members of the clergy may also be sued in civil court for the same misconduct that gives rise to criminal prosecution.[87] While several courts have rejected First Amendment arguments in criminal prosecutions, as discussed below, no court has dismissed a criminal prosecution specifically against a member of the clergy on First Amendment excessive entanglement grounds.[88]

For example, the Ninth Circuit Court of Appeals in *United States v. Rasheed*[89] rejected a defendant minister's argument that the First Amendment barred his mail fraud conviction. The minister asserted that the church program involved was a religious tenet of the church and that the First Amendment precluded the government from proving its fraudulence.[90] However, the court noted that the United States Supreme Court has held that, even though the validity of religious beliefs cannot be questioned, the sincerity of a person claiming to hold beliefs may be scrutinized.[91] The court's decision therefore pivoted on whether the minister

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84. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972) (providing that states may regulate the conduct of individuals, even if the conduct is based upon religion, to promote health, safety, or general welfare).

85. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940) (providing that states may protect their citizens from such fraudulent activities and that penal laws are available to punish such conduct).

86. *See* United States v. Fawbush, 946 F.2d 584, 588 (8th Cir. 1991) (affirming pastor's conviction for aggravated sexual abuse); People v. Hodges, 13 Cal. Rptr. 2d 412, 421 (Cal. Ct. App. 1992) (convicting a pastor for failure to report suspected incidents of child abuse); McGowan v. State, 402 S.E.2d 328, 331 (Ga. Ct. App. 1991) (affirming pastor's conviction for child molestation, cruelty to children, and aggravated assault with attempt to rape).

87. *See* Smith v. O'Connell, 986 F. Supp. 73, 81-82 (D.R.I. 1997) (denying motion to dismiss for lack of subject matter jurisdiction in an action against a priest for damages caused by sexual assault by the priest against minors); Doe v. Hartz, 970 F. Supp. 1375, 1390 (N.D. Iowa 1997) (refusing motion to dismiss for lack of subject matter jurisdiction in an action against a priest alleging sexual exploitation in violation of the Violence Against Women Act, 42 U.S.C. § 13981 (1994)); Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 814 (Minn. Ct. App. 1992) (finding civil action against church for sexual abuse of child by pastor was not unconstitutional).

88. State v. Burckhard, 1998 N.D. 121, ¶ 30, 579 N.W.2d 194, 201 n.2.

89. 663 F.2d 843 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

90. United States v. Rasheed, 663 F.2d 843, 847 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982).

91. *Id.* (citing United States v. Seeger, 380 U.S. 163, 185 (1965)).

sincerely believed in the allegedly fraudulent aspects of the program.[92] The court explained that knowingly making false assertions indicates that the assertions could not have been made pursuant to a sincere religious belief.[93] Therefore, the lower case court found that the First Amendment did not bar the minister's conviction.[94]

Similarly, the Fourth Circuit Court of Appeals rejected a minister's First Amendment claim against a conviction for mail fraud and tax evasion.[95] Among other arguments, the minister contended that charging him for failing to disclose to the church payments received as a kickback from the construction of a church building involved impermissible governmental involvement in internal church affairs.[96] The court, however, stated that the First Amendment is a shield intended to provide religious protection, not a sword to be used against the church.[97] The court quickly dismissed the First Amendment argument, stating that the defendant's First Amendment rights were not involved in the case.[98]

In a case involving a criminal prosecution for securities fraud and income tax evasion, the Seventh Circuit Court of Appeals rejected a defendant pastor's First Amendment challenge.[99] The pastor asserted that determination of appropriate uses of church money, a central issue for the charges, required the government to make a determination that violated the First Amendment.[100] The Court found the pastor's First Amendment challenge without merit, however, because neither the government's investigation nor the court's adjudication required any examination of religious law or ecclesiastical decisions.[101] Therefore, although three circuits have heard the argument in recent years, no court has dismissed a criminal prosecution against a member of the clergy on First Amendment excessive entanglement grounds, and it is in this context that the North Dakota Supreme Court heard *State v. Burckhard*.[102]

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92. *Id.*
93. *Id.*
94. *Id.* at 849.
95. *See* United States v. Snowden, 770 F.2d 393 (4th Cir.), *cert. denied*, 513 U.S. 1175 (1985).
96. *Id.* at 395.
97. *Id.* at 396.
98. *Id.* (citing United States v. Raines, 362 U.S. 17 (1960), the circuit court stated that "[c]onstitutional rights are not fungible commodities to be bartered among interested bystanders").
99. United States v. Lilly, 37 F.3d 1222 (7th Cir. 1994), *cert. denied*, 513 U.S. 1175 (1995).
100. *Id.* at 1226.
101. *Id.*
102. State v. Burckhard, 1998 N.D. 121, ¶ 30, 579 N.W.2d 194, 201 n.2.

III. CASE ANALYSIS

In *Burckhard*, the North Dakota Supreme Court examined whether the district court erred in dismissing a criminal complaint against a Catholic priest for lack of subject matter jurisdiction.[103] The court reversed on the grounds that a court's exercise of jurisdiction over prosecution of theft charges does not require excessive government entanglement in religious affairs in violation of the state or federal constitutions.[104] The court remanded for a trial on the merits.[105]

A. THE MAJORITY FINDS PRIEST NOT ABOVE—OR BEYOND—THE LAW

Writing for the majority, Justice Sandstrom rejected Burckhard's assertion that the district court constitutionally lacked subject matter jurisdiction.[106] The majority ultimately concluded that legal authority requiring civil courts to defer to the rulings of churches on ecclesiastical matters had no bearing on a case involving criminal proceedings.[107]

The majority began its analysis by reviewing the major cases in the development of this area of law. It started by examining *Watson*, the seminal case regarding separation of church and state.[108] The majority noted that in *Watson*, the United States Supreme Court admonished courts to show deference to the decisions of the highest church authority.[109]

The majority next discussed the role of *Gonzalez v. Roman Catholic Archbishop*[110] in the evolution of the civil law.[111] The majority identified that the United States Supreme Court in *Gonzalez* reaffirmed the rule from *Watson* that civil courts must give deference to the decisions of the church on ecclesiastical questions.[112]

Kedroff was the next United States Supreme Court decision the majority addressed.[113] The majority noted that in *Kedroff*, the United

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103. *Id.* ¶ 1, 579 N.W.2d at 195.
104. *Id.*
105. *Id.*
106. *Id.* ¶ 24, 579 N.W.2d at 200.
107. *Id.* However, before making this determination, the majority went through a fairly detailed analysis of the civil case law. *See generally id.* ¶¶ 13-22, 579 N.W.2d at 197-99. Considering that the majority decided that the civil authority ultimately had no bearing on a case involving criminal proceedings, it is interesting that the majority opinion borrowed significant amounts of language from the opinions of the civil cases. *Id. See infra* notes 119, 123 and accompanying text.
108. *Burckhard*, ¶ 13, 579 N.W.2d at 197.
109. *Id.* (quoting Watson v. Jones, 80 U.S. (13 Wall.) 679, 727 (1871)).
110. 280 U.S. 1 (1929).
111. *Burckhard*, ¶¶ 14-15, 579 N.W.2d at 197.
112. *Id.* ¶ 15 (quoting Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1, 16 (1929)).
113. *Burckhard*, ¶ 16, 579 N.W.2d at 197.

States Supreme Court emphasized that the basis for civil court deference to ecclesiastical decisions of the church is the First Amendment right to free exercise of religion without state interference.[114] As indicated by the majority, *Kedroff* thus elevates the *Watson* rule from its original basis upon general principles of separation of church and state.[115]

Hull Church was the next civil case that the majority examined in detail.[116] The majority included a lengthy quotation from *Hull Church*[117] in which the United States Supreme Court recognized that there are neutral principles of law which may be applied in property cases without examining religious doctrine or practice.[118]

Finally, the court discussed *Serbian Eastern Orthodox v. Milivojevich*[119] in detail.[120] Again including an extensive quotation from the United States Supreme Court,[121] the majority noted that the decision in

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114. *Id.* (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 120-21 (1952)).

115. *Id.*

116. *Burckhard*, ¶ 17, 579 N.W.2d at 197-98.

117. *Id.* The excerpt from *Hull Church* quoted by the majority in *Burckhard* was:

> [T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardized values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded. But First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. Because of these hazards, the First Amendment enjoins the employment of organs of government for essentially religious purposes, . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine . . . .

Burckhard, ¶ 17, 579 N.W.2d at 198 (quoting Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969)).

118. *Id.*

119. 426 U.S. 696 (1976).

120. *Burckhard*, ¶ 18, 579 N.W.2d at 198.

121. *Id.* The excerpt from *Milivojevich* quoted by the majority in *Burckhard* was as follows:

> [W]here resolution of the disputes cannot be made without extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them . . . .
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> . . . .
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> Yet having recognized that the Serbian Orthodox Church is hierarchical and that the decisions to suspend and defrock respondent Dionisije were made by the religious bodies in whose sole discretion the authority to make those ecclesiastical decisions was vested, the Supreme Court of Illinois nevertheless invalidated the decision to defrock Dionisije on the ground that it was 'arbitrary' because a 'detailed review of the evidence discloses that the proceedings resulting in Bishop Dionisije's removal and defrockment were not in accordance with the prescribed procedure of the constitution and the penal code of the

Serbian recognized that the First and Fourteenth Amendments mandate that civil courts must accept the decisions of the highest ecclesiastical body within a church as binding, at least when the decisions involve church doctrine.[122] After this thorough examination of civil cases, the majority ultimately concluded that the legal authority requiring civil courts to defer to the rulings of churches on ecclesiastical matters had no bearing on a case involving criminal proceedings.[123]

Therefore, the majority turned to criminal cases from courts in other jurisdictions for guidance.[124] After close examination of these decisions, all of which allowed courts to exercise jurisdiction over prosecutions against members of the clergy, the court concluded that prosecution against Burckhard would not require excessive entanglement in matters of the Catholic church's doctrine.[125] Specifically, the court found that prosecuting Burckhard for allegedly using church money for personal expenditures does not require the court to interpret ecclesiastical doctrine, policy, or laws.[126]

The majority began this analysis of criminal cases from other jurisdictions by examining *United States v. Rasheed*.[127] *Rasheed* involved the prosecution and conviction of a minister for fraudulently conducting a donation program.[128] The Ninth Circuit Court of Appeals rejected the

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> Serbian Orthodox Church.' . . . Not only was this 'detailed review' impermissible under the First and Fourteenth Amendments, but in reaching this conclusion, the court evaluated conflicting testimony concerning internal church procedures and rejected the interpretations of relevant procedural provisions by the Mother Church's highest tribunals . . . In short, under the guise of 'minimal' review under the umbrella of 'arbitrariness,' the Illinois Supreme Court has unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church . . . .

Burckhard, ¶ 18, 579 N.W.2d at 198-99 (quoting Serbian Eastern Orthodox v. Milivojevich, 426 U.S. 696, 717-18 (1976)).

122. *Id.*

123. *Id.* ¶ 24, 579 N.W.2d at 200. Before reaching this conclusion, however, the majority also recognized that the North Dakota Supreme Court has also held that civil courts must give deference to church decisions on ecclesiastical issues in resolving property disputes. *See id.* ¶ 20, 579 N.W.2d at 199 (quoting Presbytery of Bismarck v. Allen, 22 N.W.2d 625, 631 (N.D. 1946) and citing Bendewald v. Ley, 168 N.W. 693, 697 (N.D. 1917)). The majority also briefly discussed other appellate court decisions in civil cases involving impermissible entanglement in ecclesiastical issues. *See id.* ¶¶ 21-22 (citing Drevlow v. Lutheran Church, 991 F.2d 468. 471 (8th Cir. 1993), which involved the allegation of a minister that the church violated its own bylaws by taking the minister's name off of a list of ministers eligible for employment); McDonnell v. Episcopal Diocese of Ga., 381 S.E.2d 126, 127 (Ga.), *cert. denied*, 493 U.S. 935 (1989), which involved a minister's allegation of breach of contract by the Diocese for terminating his employment); and Basich v. Board of Pensions, 540 N.W.2d 82, 86 (Minn. Ct. App. 1995), *cert. denied*, 117 S. Ct. 55 (1996), which involved a breach of contract and fiduciary duty claim for investments made by a church on behalf of the congregation.

124. *Burckhard*, ¶ 26, 579 N.W.2d at 200.

125. *Id.*

126. *Id.* ¶ 31, 579 N.W.2d at 201.

127. *Id.* ¶ 27, 579 N.W.2d at 200 (citing United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982)).

128. *Id.*

minister's First Amendment argument, concluding that First Amendment protection does not extend to fraudulent activity.[129]

Next, the majority examined a case in which a minister was convicted for mail fraud and tax evasion after being paid kickbacks for a church construction project.[130] The Fourth Circuit Court of Appeals rejected the minister's First Amendment argument by determining that the prosecution would not involve an impermissible risk of entangling the government in religious doctrine or policy.[131]

Finally, the majority examined a case involving the prosecution of a pastor for securities fraud and income tax evasion.[132] Once again, a First Amendment challenge to conviction was rejected, this time by the Seventh Circuit Court of Appeals.[133]

Having considered cases involving criminal prosecutions of members of the clergy from other jurisdictions, the majority was persuaded that prosecution of Burckhard did not require the court to interpret or review ecclesiastical doctrine or policy.[134] The State bore the burden of producing evidence of Burckhard's authority and of his conduct outside of that authority, and the question of whether Burckhard made unauthorized expenditures of church money was for a factfinder to determine.[135]

Additionally, Justice Sandstrom's majority opinion rejected Burckhard's contention that dismissal was justified because he had "legal" authority over the money he spent.[136] The majority stated that the issue of Burckhard's authority is a question of fact.[137] As such, the issue is not appropriate for resolution by dismissal, but rather is a question for a trial on the merits.[138]

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129. *Id.* (citing *Rasheed*, 663 F.2d at 847).

130. *Id.* ¶ 28, 579 N.W.2d at 200 (citing United States v. Snowden, 770 F.2d 393 (4th Cir.), *cert. denied*, 474 U.S. 1011 (1985)).

131. *Id.*

132. *Id.* ¶ 29, 579 N.W.2d at 200-01 (citing United States v. Lilly, 37 F.3d 1222 (7th Cir. 1984), *cert. denied*, 513 U.S. 1175 (1985)).

133. *Id.*

134. *Id.* ¶ 31, 579 N.W.2d at 201.

135. *Id.*

136. *Id.* ¶¶ 33, 35, 579 N.W.2d at 202.

137. *Id.* ¶ 36.

138. *Id.*, 579 N.W.2d at 202-03.

B. DISSENT FINDS DETERMINATION OF AUTHORITY WOULD REQUIRE IMPERMISSIBLE GOVERNMENTAL ENTANGLEMENT IN RELIGIOUS AFFAIRS

Justice Meschke, in an opinion[139] joined by Justice Maring,[140] dissented, stating that this case could not proceed on remand to determine the scope of Burckhard's authority without an examination and interpretation of church laws and policies.[141] Justice Meschke stated that the majority failed to consider adequately a letter from the Bishop of the Diocese of Fargo explaining the scope of authority of parish priests.[142] This letter, in Justice Meschke's view, expressly established that the church had the right to adjudicate and enforce its own ecclesiastical laws.[143]

Although agreeing with the majority that courts may exercise jurisdiction over criminal prosecutions involving clergy, Justice Meschke distinguished the alleged crime in this case, theft of church property, from other crimes in which prosecution is not prohibited.[144] Moreover, Justice Meschke stated that embezzlement from a church is necessarily a property dispute and that the accused official's authority is determined by the internal policies of the church.[145] Justice Meschke therefore urged that prosecution is only permissible when it involves violations of neutral legal standards which do not rely upon the internal authority of the prosecuted church official.[146] Furthermore, Justice Meschke insisted that

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139. *Id.* ¶ 43, 579 N.W.2d at 203.

140. *Id.* ¶ 59, 579 N.W.2d at 207.

141. *Id.* ¶ 44, 579 N.W.2d at 203-04. Justice Meschke believed that evidence of Burckhard's authority, shown through testimony of church officials, by its nature involved examination of religious policies. *Id.*

142. *Id.* ¶ 45, 579 N.W.2d at 204. Justice Meschke quoted Bishop Sullivan's letter, which stated:

> In juridical matters, the pastor acts in the name of the parish. The pastor has responsibility for the administration of all parish property. If he is negligent in his duties, however, it is the right of the Bishop to intervene . . . recourse could be either through ecclesiastical courts or through the Bishop.

Id.

143. *Id.* ¶ 47, 579 N.W.2d at 204-05.

144. *Id.* ¶ 51, 579 N.W.2d at 205. Examples of such crimes are mail fraud, tax evasion, child molestation, and sexual abuse. *Id.*

145. *Id.* ¶ 46, 579 N.W.2d at 204.

146. *Id.* ¶ 51, 579 N.W.2d at 205.

dismissal by the district court was appropriate because of the important constitutional elements of the case.[147]

C. THE DETERMINATIVE CONCURRING OPINION

Chief Justice VandeWalle, concurring specially, agreed with the remand ordered in Justice Sandstrom's opinion, but only to a limited extent.[148] The Chief Justice urged the trial court on remand to seek clarification of Burckhard's authority to spend church funds.[149] Moreover, Chief Justice VandeWalle indicated that if Justice Meschke correctly construed Burckhard's authority over the church funds, as indicated by the Bishop's letter, he would concur in Justice Meschke's opinion.[150] Thus, upon clarification of the Bishop that Burckhard had authority over the church funds, Justice Meschke's position would be the majority view of the court.[151] Without it, however, Chief Justice VandeWalle's vote made Justice Sandstrom's the majority opinion.[152]

IV. IMPACT

The North Dakota Supreme Court's decision in *Burckhard* is monumental in several respects. First, for the first time, not only in North Dakota, but in the nation the court addressed and rejected a First Amendment excessive governmental entanglement argument in a case involving the prosecution of a member of the clergy.[153] This decision thus has the potential to serve as persuasive authority for courts nationwide. In the future, cases involving the prosecution for any number of crimes which arguably involve the policies of a church may turn to *Burckhard* for guidance and authority.

Perhaps the most interesting aspect of the decision, however, is the course that the case has subsequently taken. After the decision in *Burckhard*, Bishop Sullivan of the Fargo Diocese of the Catholic Church wrote a letter to Burckhard's attorney clarifying the scope of Burckhard's

147. *Id.* ¶ 54, 579 N.W.2d at 206 (stating that "[t]he question of jurisdiction of secular courts over church funds and canon law are [sic] too important to be deferred until the entire case has been adjudicated"). However, Justice Meschke noted that he would modify the dismissal. *Id.* ¶ 56. While the dismissal from the trial court was made with prejudice, Justice Meschke would dismiss without prejudice so that renewal of the prosecution would be possible if the Bishop or a higher church official chose to participate in the prosecution of criminal charges against Burckhard. *Id.*

148. *Id.* ¶ 41, 579 N.W.2d at 203 (VandeWalle, C.J., concurring specially). *See infra* note 163 and accompanying text.

149. *Burckhard*, ¶ 41, 579 N.W.2d at 203 (VandeWalle, C.J., concurring specially).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Burckhard*, ¶ 30, 579 N.W.2d at 201 n.2.

authority to spend church money.[154] In his brief letter, Bishop Sullivan stated that Justice Meschke's dissenting opinion in *Burckhard*[155] correctly interpreted Burckhard's authority.[156] Chief Justice VandeWalle, concurring specially in *Burckhard*, had indicated that he would join the opinion of the two dissenting justices if Justice Meschke had correctly interpreted the scope of Burckhard's authority over the money, as the letter indicated he had.[157] Burckhard therefore submitted the letter to the district court with the renewed motion for dismissal.[158] The district court then found that the Bishop's clarification required dismissal for lack of jurisdiction pursuant to the dissenting and concurring opinions of the court in *Burckhard*.[159]

The State appealed this decision to the North Dakota Supreme Court.[160] Oral arguments before the court were heard on January 13, 1998.[161] In *Burckhard II*,[162] the court addressed whether the district court's decision to dismiss without prejudice was consistent with the mandate of *Burckhard*.[163]

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154. Although this letter of clarification was sent to Burckhard's attorney, both the State and Burckhard requested the clarification. Brief for Appellee at 5, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d 523 (No. 980322). However, the request from the State dated March 5, 1998 tersely asked two questions: 1) "Does Bishop Sullivan support my decision to prosecute the case against Fr. Leonard Burckhard in State court[,]" and 2) "Does Bishop Sullivan, looking at the items that Scott H. knows Father Burckhard spent the approximate $189,000 on during his tenure at St. Catherine's, approve the spending that he did[.]" Appendix to Brief for Appellant at app. 56, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d (No. 980322). This letter, written by State's Attorney Robin Huseby to Nicholas Spaeth, the Diocesan attorney, also stated that the formal request could also be declined. *Id.* In response to this request, Mr. Spaeth indicated that Bishop Sullivan did not wish to comment on the matter. *Id.* at app. 57. On the other hand, Burckhard sent Bishop Sullivan a copy of the decision in *Burckhard* and requested the clarification sought by Chief Justice VandeWalle in the concurring opinion. Brief for Appellee at 6, *Burckhard II* (No. 980322).

155. *Burckhard*, ¶ 45, 579 N.W.2d at 204 (Meschke, J., dissenting).

156. Bishop Sullivan's September 15, 1998 letter to Burckhard's attorney, Robert Hoy, consisted of two paragraphs:

> Thank you for providing me a copy of the recent decision of the North Dakota Supreme Court in the case entitled "State of North Dakota v. Leonard Wayne Burckhard," Criminal No. 970275. I have now had the opportunity to read thoroughly each of the three opinions issued by the justices in reaching their decision.
>
> In an effort to clarify my position as to the authority of Father Burckhard to spend the money in question, I write to indicate the opinion of Justice Meschke, joined by Justice Maring, correctly interprets my previous letter of July 21, 1997, on that issue. I hope this will be helpful to all concerned.

Appendix to Brief for Appellant at app. 101, *Burckhard II* (No. 980322).

157. *Burckhard*, ¶ 41, 579 N.W.2d at 203 (VandeWalle, C.J., concurring specially).

158. *Burckhard II*, ¶ 2, 592 N.W.2d at 524.

159. *Id.*

160. Supplemental Appendix to Brief for Appellee at app. 110, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d (No. 980322).

161. *North Dakota Supreme Court* (visited July 28, 1999) <http://www.court.state.nd.us/Court/Calendar/19980322.htm>.

162. 1999 ND 64, 592 N.W.2d 523.

163. *Burckhard II*, ¶ 7, 592 N.W.2d at 525.

Chief Justice VandeWalle's concurrence in *Burckhard,* consisting of just three sentences,[164] played an important role in *Burckhard II.* The concurrence is artful. Simple on its face, it seems to stand for two clear propositions: First, remand was appropriate to clarify Bishop Sullivan's position as to Burckhard's authority, and second, if the Bishop said Burckhard had authority over the funds, the Chief Justice would join Justice Meschke's opinion to affirm the dismissal.[165] Upon closer examination, however, it becomes evident that Chief Justice VandeWalle's opinion is not as clear as it might appear.[166]

The first major ambiguity in the concurring opinion is what would be sufficient to "clarify" the Bishop's position.[167] This statement that "th[e] matter should be remanded to clarify the Bishop's position" suggests that the Chief Justice thought the issue should be resolved at trial.[168] However, Chief Justice VandeWalle essentially provided in his opinion that a letter from Bishop Sullivan would resolve the issue: "If the Bishop's response is as Justice Meschke construes the current response . . . ."[169] By referring to both Bishop Sullivan's first letter and the then-unwritten second letter as "response[s]," the Chief Justice intimated that a follow-up letter from Bishop Sullivan endorsing Justice Meschke's interpretation of his first letter would be sufficient to satisfy the contingency required for Chief Justice VandeWalle to join the dissent.[170] Unsurprisingly, such an endorsement of Justice Meschke's interpretation of the first letter is precisely what Bishop Sullivan's subsequent letter provided.[171]

An additional consideration with regard to the standard necessary to meet the condition in Chief Justice VandeWalle's concurring opinion is that the second letter written by Bishop Sullivan was not in affidavit form.[172] The State stipulated that the Bishop's first letter was in affidavit

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164. *Burckhard,* ¶ 41, 579 N.W.2d at 203 (VandeWalle, C.J., concurring specially). The concurring opinion, in its entirety, states:

> Insofar as the opinion written by Justice Sandstrom and the opinion written by Justice Meschke view Bishop Sullivan's letter differently, I believe this matter should be remanded to clarify the Bishop's position as to the question of the authority of Father Burckhard to spend the money. To this limited extent, I agree with the remand ordered in Justice Sandstrom's opinion. If the Bishop's response is as Justice Meschke construes the current response, I would concur in Justice Meschke's opinion.

Id.

165. *See id.*
166. *See id.*
167. *See id.*
168. *See id.*
169. *See id.*
170. *See id.*
171. *See supra* note 154.
172. Supplemental Appendix to Brief for Appellee at app. 113, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d 523 (No. 980322). This document is a memorandum written by District

form.[173] With regard to the second letter, the district judge, probably recognizing the import of the second letter, notified the attorneys for both sides of the fact that the letter was not in affidavit form and provided the opportunity for the State to raise it as an issue.[174] The State responded by affirmatively stating that the form of the letter was not an issue.[175] The State probably erred in not objecting to the admission of the letter, and it should have realized this error upon notification by the district judge.[176]

In the appeal of *Burckhard II* to the supreme court, the State raised several questions with regard to the posture and intent of Bishop Sullivan.[177] Unfortunately for the prosecution, the resolution of such questions would require an inquiry into church affairs which would constitute excessive government entanglement, as prohibited by both the state and federal constitutions,[178] which the supreme court recognized.[179] The majority opinion of Justice Sandstrom in *Burckhard* recognized that "[t]he Establishment Clause forbids courts from second-guessing the church's ruling on internal matters of policy and doctrine, because the process of second-guessing would require excessive government entanglement in church affairs."[180] Citing this paragraph of Justice Sandstrom's opinion in *Burckhard,* Justice Maring's majority opinion in *Burckhard II* stated that "[t]he State's wish to second-guess the Bishop's position is precisely the type of governmental foray into internal church affairs that would violate the basic principles of separation of church and

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Judge Everett Nels Olson to the attorneys for both sides of the dispute, dated September 23, 1998. *See id.* Judge Olson was the trial judge presiding over the proceedings on remand. *See id.*

173. *Id.* at app. 104. This document is the Stipulation for Clarification of Record, dated August 28, 1997, and signed by the attorneys representing both sides of the dispute. *See id.*

174. *Id.* at app. 113.

175. *Id.* at app. 114. This document is a memorandum written by State's Attorney Robin Huseby to Judge Everett Nels Olson in reply to his September 23, 1998 memorandum. See id.

176. *Id.* at app. 113-14.

177. *See* Brief for Appellant at 5-7, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d 523 (No. 980322). An example of the questions raised by the State involves the possibility that Bishop Sullivan's position as to the authority of Burckhard has changed over time. *Id.* at 5. Another example of the questions raised by the prosecution is that the Bishop had a bias and a vested interest in having the case dismissed, in that the Diocese would not then bear any responsibility for the theft by an employee, Burckhard. Appendix to Brief for Appellant at app. 50, State v. Burckhard (*Burckhard II*), 1999 N.D. 64, 592 N.W.2d 523 (No. 980322). The State raised this question in its the Brief in Opposition to Motion to Dismiss, dated Sept. 17, 1998. *See id.* at app. 51.

178. *See supra* notes 31, 33 and accompanying text.

179. *Burckhard II*, ¶¶ 10, 16, 592 N.W.2d at 526.

180. *Burckhard*, ¶ 25, 579 N.W.2d at 200, *cited in* Defendant's Reply Brief on Renewed Motion to Dismiss (Jurisdiction), Appendix to Brief for Appellant at app. 45, *Burckhard II* (No. 980322).

state."[181] The decision in *Burckhard II* therefore affirmed the district court's order dismissing the charges against Burckhard.[182]

However, the importance and novelty of *Burckhard* remain, and it still may be persuasive authority for courts nationwide. Essentially, *Burckhard* stands for the proposition that in a case involving questions as to the authority of a priest to spend church money, the State may constitutionally proceed with prosecution.[183]

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181. *Burckhard II*, ¶ 9, 592 N.W.2d at 525. Justice Neumann's concurring opinion also referenced Justice Sandstrom's warning in *Burckhard* and chastised the State:

> I thought Justice Sandstrom's opinion in *Burckhard I*, the opinion in which I concurred, made it quite clear that any attempt to reach beyond the question of Father Burckhard's authority, any attempt to probe the validity, veracity, or accuracy of the Bishop's pronouncement regarding that authority, would be strictly forbidden by the First Amendment. Apparently, the opinion was not clear enough to deter the State from venturing into such forbidden territory.

Burckhard II, ¶ 16, 592 N.W.2d at 526 (Neumann, J., concurring).

182. *Burckhard II*, ¶ 11, 592 N.W.2d at 526.

183. *Burckhard*, ¶ 39, 579 N.W.2d at 203.