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## State v. Etsitty: The Past, Present, and Future Prosecution of Drunks Who Drive with Children

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# ***STATE V. ETSITTY: THE PAST, PRESENT, AND FUTURE PROSECUTION OF DRUNKS WHO DRIVE WITH CHILDREN***

Adam Flores\*

## **INTRODUCTION**

On a summer day in 2010, State District Judge John Dean of New Mexico's Eleventh Judicial District presided over seventy-two defendants.<sup>1</sup> Of these, ten faced felony child abuse charges stemming from allegations that each had driven drunk with a child-passenger.<sup>2</sup> While these numbers were perhaps unusually high, one San Juan County Deputy District Attorney has estimated that up to 5 percent of all misdemeanor DWI cases filed in the county also include a felony child abuse charge.<sup>3</sup>

Meanwhile, as defendants face similar charges in courtrooms across the state, the New Mexico Supreme Court has been narrowing its construction of both the DWI and child abuse statutes. First, the seemingly limitless expansion of DWI liability has now, in fact, been limited to require that the state prove a defendant's intent to drive whenever DWI by actual physical control—"future DWI"—is alleged.<sup>4</sup> Second, the extraordinarily vague and publicly maligned<sup>5</sup> language of New Mexico's child abuse by endangerment statute has recently been re-interpreted to require that the state introduce evidence sufficient to prove that a child was placed at a substantial and foreseeable risk of harm.<sup>6</sup> These decisions

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1. Ryan Boetel, *Police and Prosecutors: More People are Getting Caught Driving Drunk with Children*, FARMINGTON DAILY TIMES, July 18, 2010.

2. *Id.*

3. *Id.*

4. State v. Sims, 2010-NMSC-027, 148 N.M. 330, 236 P.3d 642. For the purposes of this article, the term "future DWI" corresponds to the charge of DWI by actual physical control which seeks to deter potential drunk driving. Conversely, both "past" and "present DWI" correspond to a typical DWI charge where the defendant is charged with actually driving a moving vehicle.

5. Concerns about the child endangerment statute have been expressed to the media by legislators. Crystal Gutierrez, *Lawmakers say child abuse law vague*, KRQE TV (Oct. 11, 2012), <http://www.krqe.com/dpp/news/crime/lawmakers-say-child-abuse-law-vague>.

6. State v. Chavez, 2009-NMSC-035, 146 N.M. 434, 211 P.3d 891.

were designed to prevent the criminalization of conduct that is too remote from actual harm.

In a case out of Farmington—also part of the Eleventh Judicial District—the New Mexico Court of Appeals in *State v. Etsitty*<sup>7</sup> found itself at the intersection of these developments. *Etsitty* concerned a defendant charged with felony child abuse based on a DWI that had not yet occurred. Mindful of the supreme court's recent decisions prohibiting the criminalization of remote harms, the *Etsitty* court responded by drawing a bright line that predicates a child abuse conviction on past and present DWI, while prohibiting the same conviction when the underlying conduct is future DWI.<sup>8</sup> This note evaluates issues that arise on both sides of this line. In the context of past and present DWI, the court of appeals has silently discarded the elements of child abuse and judicially enacted a strict liability, child-passenger felony—punishable by three years imprisonment and a \$5,000 fine. In the context of future DWI, the court has hamstrung the state's power to distinguish the added culpability of offenders who would drive drunk with child-passengers from those who would drive drunk alone.

Noting that the supreme court and the court of appeals have generated two conflicting standards for measuring remote harms, this note evaluates the state of the law after *Etsitty*. Part I canvasses the panoply of laws in other jurisdictions used to protect children from DWI. It then analyzes New Mexico's position among a small minority of states that have not enacted a statute that specifically targets the composite crime of DWI/child endangerment—known as “DWI endangerment.” Part II explores the legal standards of the separate crimes of DWI and child abuse in New Mexico, which together form the current mechanism for criminalizing DWI endangerment in the state. Part III explains the decision in *Etsitty*, and Part IV critically evaluates that decision and its subsequent application in *State v. Orquiz*. The article concludes by recommending a legislative solution that would serve the deterrence interests of the community without continuing to punish defendants with an imported, absolute liability, misdemeanor standard that was never intended to serve as a predicate for felony child abuse.

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7. 2012-NMCA-012, 270 P.3d 1277, *cert. denied*, December 21, 2012, No. 33,317.

8. See *Etsitty*, 2012-NMCA-012, ¶ 11.

## I. THE SOCIAL DIMENSIONS OF DWI ENDANGERMENT

In 2012, there were 239 child fatalities in alcohol-impaired motor vehicle crashes nationwide.<sup>9</sup> This number accounted for 20 percent of all child fatalities that year.<sup>10</sup> Half of these young victims were riding as passengers in vehicles operated by drivers with blood alcohol concentrations exceeding .08.<sup>11</sup> Numerous factors correlate intoxicated driving to the harm of child-passengers. For instance, drunk drivers are less likely than sober drivers to use active restraints, such as seatbelts, on their occupants.<sup>12</sup> Indeed, the higher the driver's blood alcohol content, the lower the chance the child-passenger will be restrained.<sup>13</sup> These dangers have prompted Mothers Against Drunk Driving (MADD) to lobby for comprehensive DWI endangerment laws that impose mandatory penalties when a driver is intoxicated with a child in the vehicle.<sup>14</sup> According to MADD, as of November 2013, forty-five states and the District of Columbia have laws of this type.<sup>15</sup> Existing laws generally treat the presence of a child-passenger as an aggravating circumstance to DWI.<sup>16</sup> Penalty enhancements can range from fines and driver's license suspensions to long-term imprisonment.<sup>17</sup> For instance, on the far end of the spectrum, "Leandra's Law" in New York escalates the DWI penalty for first offenders to a felony punishable by up to four years in prison when a child is present in the vehicle with the intoxicated driver.<sup>18</sup>

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9. NHTSA, TRAFFIC SAFETY FACTS (2012), <http://www-nrd.nhtsa.dot.gov/pubs/811870.pdf>.

10. *Id.*

11. *Id.*

12. Kyran P. Quintlan et al., *Characteristics of Child Passenger Deaths and Injuries Involving Drinking Drivers*, J. AM. MED. ASS'N. 2249, 2250 (2000).

13. Ruth Shults et al., *Alcohol-Impaired Drivers: Reducing the Risk for Children*, 33 J.L. MED. & ETHICS 49 (2005).

14. Child Endangerment, MOTHERS AGAINST DRUNK DRIVING, [http://www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf) (last updated Nov. 2013).

15. *Id.* Many of these laws define "driving" with the same "actual physical control" language that is used in New Mexico. *E.g.*, Ark. Code Ann. § 5-65-103(a) (2013) ("It is unlawful and punishable as provided in this act for any person who is intoxicated to operate or be in actual physical control of a motor vehicle.").

16. *E.g.*, Minn. Stat. § 169A.03(3)(1) (2013) ("Aggravating factor includes . . . having a child under the age of 16 in the motor vehicle at the time of the offense if the child is more than 36 years younger than the offender.").

17. Child Endangerment, MOTHERS AGAINST DRUNK DRIVING, [http://www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf) (last updated Nov. 2013).

18. N.Y. Veh. & Traf. Law § 1192 (2)(b).

New Mexico is in the minority of states that have not enacted a DWI endangerment statute.<sup>19</sup> State legislators have previously advanced two different types of proposals.<sup>20</sup> The first has sought to amend the current child abuse statute to add a provision specific to DWI that would essentially codify a strict liability felony for DWI when a child is present in the vehicle.<sup>21</sup> This type of felony DWI endangerment statute would be similar to Leandra's Law and fairly unusual among the jurisdictions.<sup>22</sup> The second type of bill proposed would make the presence of a child-passenger an aggravating circumstance with a corresponding—relatively minor—penalty enhancement to DWI.<sup>23</sup> This type of statute would be in line with what most other jurisdictions have enacted.<sup>24</sup> Enacting a DWI endangerment statute of either sort would have the added benefit of allowing the legislature to draft its desired penalty regime and define appropriate defenses.<sup>25</sup>

In the absence of a statute targeted specifically at DWI endangerment, New Mexico courts continue to aggravate the penalty for this unique social harm by viewing the child abuse statute through the lens of the underlying conduct of DWI.

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19. Child Endangerment, *MOTHERS AGAINST DRUNK DRIVING*, [http://www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf) (last updated Nov. 2013).

20. H.B. 490, 46th Leg., 2nd Sess. (N.M. 2004); H.B. 94, 46th Leg., 2nd Sess. (N.M. 2004); *see generally* Deborah Baker, *Tougher DWI Law Endorsed*, *ALBUQUERQUE J.*, (2004), <http://www.abqjournal.com/news/xgr/2004/139487xgr01-31-04.htm>.

21. H.B. 490, 46th Leg., 2nd Sess. (N.M. 2004); *see also* S.B. 390, 47th Leg., 1st Sess. (N.M. 2005) (similar proposal in the Senate).

22. The other states with laws of this type are Arizona, Indiana, Oklahoma, and Texas. Child Endangerment, *MOTHERS AGAINST DRUNK DRIVING*, [http://www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf) (last updated Nov. 2013).

23. H.B. 94, 46th Leg., 2nd Sess. (N.M. 2004) (amended by the House Judiciary Committee to read: "Aggravated driving while under the influence of intoxicating liquor or drugs consists of a person who . . . while under the influence of intoxicating liquor or any drug to a degree that renders the person incapable of safely driving a vehicle, drives a vehicle . . . with one or more passengers who are less than eighteen years of age."). The child endangerment provision was removed in the Senate and the bill was vetoed.

24. Child Endangerment, *MOTHERS AGAINST DRUNK DRIVING*, [http://www.madd.org/laws/law-overview/DUI\\_Child\\_Endangerment\\_Overview.pdf](http://www.madd.org/laws/law-overview/DUI_Child_Endangerment_Overview.pdf) (last updated Nov. 2013).

25. For instance, some states have determined that it should be a defense if the driver and passenger are near the same age. *E.g.*, Ark. Code Ann. § 5-65-111(D) ("It is an affirmative defense to prosecution . . . that the person operating or in actual physical control of the motor vehicle was not more than two (2) years older than the passenger.").

## II. APPLICABLE LEGAL STANDARDS

The New Mexico Supreme Court recently narrowed its construction of the state's DWI and child abuse statutes. Part II.A provides an overview of the applicable law on DWI by actual physical control. Part II.B turns to the evolving law on child abuse by endangerment.

### A. DWI by Actual Physical Control in New Mexico

New Mexico's DWI statute makes it unlawful for a person "who is under the influence of intoxicating liquor to drive a vehicle within [the] state."<sup>26</sup> Courts have interpreted the statute to give rise to liability even when an offender never actually drives anywhere or puts any vehicle into motion.<sup>27</sup> Liability in this sense relies on the term "drive," which the supreme court has linked to the definition of "driver" in the Motor Vehicle Code.<sup>28</sup> In pertinent part, the code defines a driver as one who exerts "actual physical control" over a motor vehicle.<sup>29</sup> Thus, sitting in a vehicle parked in the middle of the street with the engine running;<sup>30</sup> passing out in a parked vehicle with the key in the ignition and transmission in drive;<sup>31</sup> and falling asleep in a running but unmoving vehicle in a hotel parking lot<sup>32</sup> have all been held sufficient to constitute "actual physical control" and thus "driving" for the purposes of DWI liability.

"Actual physical control" has historically referred to two functionally distinct types of conduct.<sup>33</sup> In some cases, police officers have confronted *past driving*. This occurs, for instance, when an intoxicated person is found at the wheel of a running vehicle parked in the center of the

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26. NMSA 1978, § 66-8-102(A). The alternative per se provision provides: "It is unlawful for . . . a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath . . ." *Id.* § 66-8-102(C).

27. *Boone v. State*, 1986-NMSC-100, ¶ 3, 105 N.M. 223, 731 P.2d 366 (DWI offense occurs when a person under the influence "drives *or* is in actual physical control of a motor vehicle" (emphasis added)).

28. *Boone*, 1986-NMSC-100, ¶ 4, 105 N.M. 223. For a fair critique of the statutory interpretation employed in *Boone*, which spawned the modern actual physical control jurisprudence in New Mexico, see *Sims*, 2010-NMSC-027, ¶¶ 28–32, 148 N.M. 330.

29. NMSA 1978, § 66-1-4.4(K) ("‘Driver’ means every person who drives or is in actual physical control of a motor vehicle, including a motorcycle, upon a highway, who is exercising control over or steering a vehicle being towed by a motor vehicle or who operates or is in actual physical control of an off-highway motor vehicle.").

30. *Boone*, 1986-NMSC-100, 105 N.M. 223.

31. *State v. Harrison*, 1992-NMCA-139, 115 N.M. 73, 846 P.2d 1082.

32. *State v. Johnson*, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233.

33. See generally *Sims*, 2010-NMSC-027, ¶¶ 13–18, 148 N.M. 330.

highway.<sup>34</sup> In other cases, actual physical control liability has been premised on the potential for *future driving*.<sup>35</sup> In the latter category, the state does not argue that the accused has previously driven, but rather that the accused could immediately have begun driving but for the arrival of the arresting officer.<sup>36</sup> While the guiding rationale behind actual physical control jurisprudence springs from the need to address the former of these DWI categories,<sup>37</sup> it was eventually conflated and applied to the latter without distinction.<sup>38</sup> Though perhaps technically imprecise, the judicial extension of actual physical control liability to future DWI is said to promote public safety by making it a crime for intoxicated individuals to put themselves in a position where they can “directly commence operating a vehicle.”<sup>39</sup> This prohibition on future drunk driving has now firmly taken hold; in a further departure from earlier jurisprudence, the option to prove actual physical control is now *only* available to the state in cases where future DWI is alleged.<sup>40</sup>

In *State v. Sims*, the New Mexico Supreme Court narrowed the applicability of DWI by actual physical control. The court held that while DWI normally remains a strict liability offense, a charge of DWI based entirely on potential for future driving requires the state to prove that the defendant actually intended to drive “so as to pose a real danger to him-

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34. *Boone*, 1986-NMSC-100, 105 N.M. 223.

35. *Harrison*, 1992-NMCA-139, ¶ 14, 115 N.M. 73 (“The fact that the officers discovered no signs that the vehicle had been moved by [the defendant] is irrelevant.” (citation omitted)).

36. *See, e.g., Johnson*, 2001-NMSC-001, 130 N.M. 6; *Harrison*, 1992-NMCA-139, 115 N.M. 73.

37. *Sims*, 2010-NMSC-027, ¶¶ 13–18, 148 N.M. 330 (discussing the origin of the court’s “actual physical control” jurisprudence in *Boone*, 1986-NMSC-100, 105 N.M. 223). At common law, an officer could not arrest an offender for a misdemeanor without either getting a warrant or observing the offense. Thus, if “driving” was read literally in the DWI statute, officers would be unable to arrest offenders on the scene for clear cases of past DWI. Instead, an officer would conceivably be required to leave the scene and return with a warrant. The *Boone* court was disinclined to alter the misdemeanor arrest rule to prevent this result, and thus inclined to interpret the definition of “driving” in the DWI statute broadly enough that the act of assuming actual physical control of the vehicle became the crime itself and would thus be “observed” by the arresting officer in cases of past DWI. *Id.*

38. *State v. Mailman*, 2010-NMSC-036, ¶ 25, 148 N.M. 702, 242 P.3d 269 (“[P]rior decisions . . . have created confusion by using actual physical control as an evidentiary tool for proving DWI based on both (1) past DWI when the accused is apprehended in a vehicle that is no longer in motion, and (2) the threat of future DWI, thereby conflating the two.”). For an example of the conflation of rationales, *see Johnson*, 2001-NMSC-001, ¶ 17, 130 N.M. 6.

39. *Johnson*, 2001-NMSC-001, ¶ 19, 130 N.M. 6.

40. *Mailman*, 2010-NMSC-036, ¶ 28, 148 N.M. 702.

self, herself, or the public.”<sup>41</sup> With this decision, the *Sims* court recognized that the criminal law should not be deterring intoxicated individuals from seeking shelter in their vehicles in lieu of trying to drive home.<sup>42</sup>

The court also recognized that including an intent element makes the theory of future DWI by actual physical control “analytically similar to an attempt crime.”<sup>43</sup> Thus, post-*Sims*, when the state seeks to prove DWI based solely on the potential for future driving, it must prove “an overt act sufficient to establish actual physical control of the vehicle along with the general intent to drive.”<sup>44</sup>

### *B. New Mexico’s Child Abuse by Endangerment Offense*

Child abuse by endangerment, a third-degree felony in New Mexico, is best described as a “special classification designed to address situations where an accused’s conduct exposes a child to a significant risk of harm, ‘even though the child does not suffer a physical injury.’”<sup>45</sup> The endangerment provision of the child abuse statute provides: “Abuse of a child consists of a person knowingly, intentionally, or negligently,<sup>46</sup> and without justifiable cause, causing or permitting a child to be placed in a situation that may endanger the child’s life or health.”<sup>47</sup> The New Mexico Supreme Court has recognized that, taken literally, the endangerment provision could be read to permit the prosecution of any conduct that may remotely endanger a child.<sup>48</sup> Determining that the legislature could not

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41. *Sims*, 2010-NMSC-027, ¶¶ 4, 26, 148 N.M. 330.

42. *Id.* ¶ 25, 148 N.M. 330 (“The individual’s recognition that he is too intoxicated to drive embodies the aim of our DWI law and its enforcement. To subject this type of behavior to strict liability would be counterproductive.”).

43. *Id.* ¶ 27, 148 N.M. 330.

44. *Id.* (citing NMSA 1978, § 30-28-1).

45. *Chavez*, 2009-NMCA-035, ¶ 15, 146 N.M. 434 (quoting *State v. Ungarten*, 1993-NMCA-073, ¶ 10, 115 N.M. 607, 856 P.2d 569).

46. In New Mexico, negligence in the criminal context does not mean the same thing as negligence in the civil context. The distinguishing feature between the two is not the defendant’s subjective awareness of risk, but rather “the *magnitude of risk* itself.” *State v. Schoonmaker*, 2008-NMSC-010, ¶ 43, 143 N.M. 373, 176 P.3d 1105 (emphasis added). See *Santillanes v. State*, 1993-NMSC-012, ¶ 29, 115 N.M. 215, 849 P.2d 358 (“[T]o satisfy the element of negligence in Section 30-6-1(C), we require proof that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child.”). See generally Gregory Williams, *The Child Abuse Statute Now Requires Criminal Negligence: Santillanes v. State*, 24 N.M. L. REV. 477 (1994).

47. NMSA 1978, § 30-6-1(D)(1).

48. *Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434.



have intended to enact a statute that is unconstitutionally vague, courts have never interpreted the term “may endanger” literally.<sup>49</sup>

For sixteen years prior to *State v. Chavez*, New Mexico courts struggled with tests that purported to give restrictive construction to the endangerment provision.<sup>50</sup> The most common articulation of the test was set forth in *State v. Ungarten*, where the court of appeals asked whether there was a “reasonable probability or possibility that the child will be endangered.”<sup>51</sup> Armed with this standard, courts made heroic efforts to quantify the likelihood of abstract potential harms.<sup>52</sup> Indeed, the court of appeals has even suggested that emotional harm may establish felony child abuse.<sup>53</sup>

In *Chavez*, the New Mexico Supreme Court acknowledged that the reasonable probability or possibility test connoted two different levels of risk, and as such, left unclear the amount of risk necessary to violate the statute.<sup>54</sup> More fundamentally, the *Chavez* court attacked the premise that the likelihood that harm will occur, the sole factor in the *Ungarten* analysis, could be determinative of child abuse by endangerment.<sup>55</sup> The court relied on the standard already being communicated to New Mexico juries and held that the state must now prove that the defendant’s con-

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49. *Id.* ¶ 18, 146 N.M. 434 (“Although ‘may’ is defined as ‘a possibility,’ our concerns for adequate notice and fairness to the accused suggest that the relevant conduct must create more than a ‘possibility’ of harm before it may be punished as a felony.”).

50. For instance, the following cases, each abrogated by *Chavez*, demonstrate the breadth of vocabulary exhausted by courts attempting to clarify the term “may” in the child endangerment statute: *State v. Jensen*, 2006-NMSC-045 ¶ 10, 140 N.M. 416, 143 P.3d 178 (evidence of child endangerment is sufficient when “a defendant places a child within the zone of danger and physically close to an inherently dangerous situation”); *State v. Trujillo*, 2002-NMCA-100 ¶ 14, 132 N.M. 649, 53 P.3d 909 (“[T]he question is one of whether the defendant’s conduct caused the child to be exposed to a significant risk of harm.”); *State v. Ungarten*, 1993-NMCA-073, ¶ 11, 115 N.M. 607, 856 P.2d 569 (child abuse requires a “reasonable probability or possibility that the child will be endangered” (internal quotation marks omitted)); *State v. Roybal*, 1992-NMCA-114, ¶ 32, 115 N.M. 27, 846 P.2d 333 (child abuse requires that a child was “in fact” placed in danger).

51. 1993-NMCA-073, ¶ 11, 115 N.M. 607 (internal quotation marks omitted).

52. *See, e.g.*, *State v. Graham*, 2005-NMSC-004, 137 N.M. 197, 109 P.3d 285 (asked to determine whether a marijuana bud in a child’s crib constituted a reasonable probability or possibility of harm).

53. *Trujillo*, 2002-NMCA-100, ¶ 20, 132 N.M. 649.

54. *Chavez*, 2009-NMSC-035, ¶ 17, 146 N.M. 434 (“‘Probability’ conveys a certain likelihood that a result will occur, whereas ‘possibility’ means that something is merely capable of occurring.”).

55. *Id.* ¶¶ 23–26, 146 N.M. 434.

duct creates a “substantial and foreseeable risk” of harm to the child.<sup>56</sup> In addition to the *Ungarten* “likelihood of harm” factor, the court articulated two other factors that the fact-finder may consider in determining whether a risk is substantial and foreseeable: (1) the seriousness of the threatened injury and (2) the violation of a separate criminal statute.<sup>57</sup> The decision in *Chavez* thus requires the state to introduce specific evidence that will assist the fact-finder in weighing these factors—and no single factor is dispositive of the analysis.<sup>58</sup> For instance, in *Chavez* itself, the court held the state accountable for failing to articulate specific potential harms and failing to provide expert testimony or other tools that would help the jury evaluate the likelihood and gravity of potential dangers.<sup>59</sup>

Together, *Chavez* and *Sims* thus appear to provide two layers of protection to insulate defendants from liability based on the mere possibility of child endangerment via future DWI: *Chavez* by requiring that the state prove a substantial and foreseeable risk of harm, and *Sims* by requiring that the state prove that the defendant had a general intent to drive.

### III. STATE V. ETSITTY: A BRIGHT-LINE APPROACH TO DWI ENDANGERMENT

In January 2010, while conducting a warrant round-up at a trailer park in Farmington, New Mexico, officers encountered Darwin Etsitty seated in the driver’s seat of his pickup truck, which was parked in his driveway.<sup>60</sup> Etsitty, keys in hand, told officers that he was preparing to drive to the store.<sup>61</sup> Etsitty’s wife and four-year-old son sat next to him in the cab of the truck.<sup>62</sup> At the time of these events, Etsitty had bloodshot, watery eyes and was slurring his speech—indicating intoxication.<sup>63</sup> When Etsitty failed to keep his balance during standard field sobriety tests, officers placed him under arrest for DWI and transported him to the police station where he provided breath samples with an alcohol concentration

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56. *Id.* ¶ 22, 146 N.M. 434. The Court adopted this language from UJI 14-604 NMRA. This standard also brought New Mexico in line with other jurisdictions, generally. *see generally* 43 C.J.S. Infants § 112 (2012).

57. *Chavez*, 2009-NMSC-035, ¶¶ 23–26, 146 N.M. 434; *State v. Gonzales*, 2011-NMCA-081, ¶ 17, 150 N.M. 494, 263 P.3d 271.

58. *Chavez*, 2009-NMSC-035, ¶ 25, 146 N.M. 434.

59. *Id.* ¶¶ 37–40, 146 N.M. 434.

60. *Etsitty*, 2012-NMCA-012, ¶ 2.

61. *Id.*

62. *Id.*

63. *Id.*

of .15 grams per 210 liters of breath.<sup>64</sup> Etsitty was charged with DWI and child abuse by endangerment.<sup>65</sup>

### A. District Court

At the close of the state's case, Etsitty moved for directed verdict on the child abuse charge, arguing that no evidence had been presented to support abuse.<sup>66</sup> The district court denied the motion.<sup>67</sup> Etsitty was convicted of DWI and child abuse by endangerment and sentenced to three years imprisonment for the child abuse conviction and 364 days for the DWI.<sup>68</sup> Etsitty appealed the endangerment conviction, asserting that the district court erred in denying his motion for directed verdict because there was insufficient evidence to support the conviction "based upon a DWI that had not yet occurred."<sup>69</sup>

### B. New Mexico Court of Appeals

In *State v. Etsitty*, Judge Vanzi, writing for the New Mexico Court of Appeals, penned a unanimous opinion agreeing with Etsitty and setting the bounds on New Mexico's child abuse by endangerment offense in the DWI context.<sup>70</sup> The court held that criminal liability cannot be predicated on the mere presence of a child with an intoxicated adult in a nonmoving vehicle—even when the circumstances technically meet the elements of DWI.<sup>71</sup>

The *Etsitty* court noted a line of cases that have upheld child endangerment convictions when defendants actually drove while intoxicated with a child-passenger in the vehicle.<sup>72</sup> The court interpreted these cases to "clearly establish" that DWI based on actual driving can predicate a

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64. *Id.* ¶ 3.

65. *Id.* ¶ 2.

66. *Id.* ¶ 4.

67. *Id.*

68. Brief of Plaintiff-Appellee at 1, *State v. Etsitty*, No. 30,779. Judge Hynes ordered the sentences to run concurrently for three years, followed by two years parole. *Id.*

69. *Etsitty*, 2012-NMCA-012, ¶ 1. The only evidence offered by the state was the testimony of the two arresting officers. *Id.* ¶ 4.

70. 2012-NMCA-012.

71. *Id.* ¶¶ 13–14.

72. *Id.* ¶ 8 (citing the following cases: *State v. Santillanes*, 2001-NMSC-018, ¶¶ 2, 38, 130 N.M. 464, 27 P.3d 456; *State v. Chavez*, 2009-NMCA-089, ¶ 14, 146 N.M. 729, 214 P.3d 794; *State v. Watchman*, 2005-NMCA-125, ¶¶ 4–5, 138 N.M. 488, 122 P.3d 855; *State v. Montoya*, 2005-NMCA-078, ¶¶ 2, 4, 137 N.M. 713, 114 P.3d 393). Notably, none of these cases were decided after *Chavez*.

child endangerment charge and conviction.<sup>73</sup> The court expressed concern, however, that “difficulties arise” when the child and intoxicated adult are found merely sitting in a nonmoving vehicle, as was the case in *Etsitty*.<sup>74</sup> The court relied on the New Mexico Supreme Court’s decision in *Chavez* for the proposition that “theoretical dangers” are not enough to demonstrate the “substantial risk of harm” required of child abuse by endangerment.<sup>75</sup>

Rather than determine whether the state had provided the jury evidence to weigh the child abuse factors laid out in *Chavez*, the *Etsitty* court set about defining a “theoretical danger.” Recognizing that *State v. Cotton*<sup>76</sup> was decided after the parties in *Etsitty* had already submitted briefs, the court determined that the holding in *Cotton* remained relevant nonetheless.<sup>77</sup> Cotton was found intoxicated with his girlfriend and four children in his vehicle, parked on the side of the road.<sup>78</sup> The vehicle was not running, the keys were not in the ignition, and Cotton was not actually prosecuted for DWI by actual physical control over the vehicle.<sup>79</sup> Nevertheless, according to the court in *Etsitty*, *Cotton* controlled the result in *Etsitty* where the defendant was found somewhat similarly situated, intoxicated and in the company of his child in a nonmoving vehicle.<sup>80</sup> The court recognized that the state in both cases incorrectly relied on “the theory that ‘the possibility [the defendant] might drive’ placed the children in a situation that endangered their lives and health.”<sup>81</sup> Since the court in *Chavez* had already determined that the legislature never intended that the mere possibility of harm would support a child abuse conviction, the state could not prevail in *Cotton* or in *Etsitty*.<sup>82</sup> In other words, since actual driving had not yet occurred in either case, the danger to the child-passengers was only theoretical and thus barred from criminal prosecution by *Chavez*.

The court rejected the distinction that, unlike Cotton, Etsitty had admitted that he was about to drive while intoxicated, which formed the

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73. *Id.*

74. *Id.* ¶ 9.

75. *Etsitty*, 2012-NMCA-012, ¶ 9 (“[B]y classifying child endangerment as a third-degree felony, our Legislature anticipated that criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers.” (quoting *Chavez*, 2009-NMSC-035, ¶ 16, 146 N.M. 434)).

76. *State v. Cotton*, 2011-NMCA-096, 150 N.M. 583, 263 P.3d 925.

77. *Etsitty*, 2012-NMCA-012, ¶ 11.

78. *Id.* ¶ 10.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

basis for establishing intent to drive—required by *Sims* whenever actual physical control is alleged.<sup>83</sup> The *Etsitty* court declared, “DWI by actual physical control by its very nature relies on the possibility of future conduct, and its departure from the typical requirement of criminal actus reus is unique.”<sup>84</sup> The court reasoned that, after *Sims*, allowing DWI by actual physical control to predicate child abuse would impermissibly turn child abuse into an attempt crime as well.<sup>85</sup> This “unique” departure, according to the court, should be limited to DWI since child abuse by endangerment was never intended by the legislature to be an attempt crime.<sup>86</sup>

The court then located further support from outside the DWI context in *State v. Roybal*<sup>87</sup> for the proposition that a possibility of danger to a child is distinct from actually placing a child in danger.<sup>88</sup> In *Roybal*, the defendant purchased heroin while his child waited in a nearby vehicle.<sup>89</sup> The *Roybal* court held that although the defendant’s actions might have resulted in violence, there was insufficient evidence that the child was actually placed in danger.<sup>90</sup> Analogizing to *Roybal*, the *Etsitty* court reasoned that DWI by actual physical control, as a matter of law, establishes a possibility of danger to a child, without actually placing a child in danger.<sup>91</sup>

The court identified two situations in dicta in which DWI is sufficient to establish child abuse by endangerment: (1) If the defendant is observed actually driving while intoxicated (i.e., in a moving vehicle) with a child-passenger; and (2) if there is sufficient evidence that a defendant in a nonmoving vehicle was previously driving while intoxicated with a child-passenger.<sup>92</sup> For the purposes of resolving child abuse by endangerment charges, the court of appeals thus recognizes a meaningful difference between past, present, and future intoxicated driving even though all three categories are illegal DWI.<sup>93</sup>

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83. *Id.* ¶¶ 12–13.

84. *Id.* ¶ 12.

85. *Id.* ¶ 13 (“Defendant here was convicted of committing an overt act in furtherance of and with intent to commit child abuse, but at the point when Defendant was intercepted by the officers, the crime of child abuse had not yet been completed.”).

86. *Id.*

87. 1992-NMCA-114, 115 N.M. 27, 846 P.2d 333.

88. *Etsitty*, 2012-NMCA-012, ¶ 14 (citing *Roybal*, 1992-NMCA-114, 115 N.M. 27).

89. 1992-NMCA-114, ¶ 31, 115 N.M. 27.

90. *Id.* ¶ 32, 115 N.M. 27.

91. *Etsitty*, 2012-NMCA-012, ¶ 14.

92. *Id.* ¶ 11.

93. See *supra* note 30 and accompanying text.

## IV. ANALYSIS AND IMPLICATIONS

The court of appeals' bright-line rule undermines the supreme court's decisions in *Chavez* and *Sims*. The arbitrary past, present, and future distinction in *Etsitty* erodes fundamental protections for defendants by eliminating the elements of felony child abuse and its defenses when past or present DWI is alleged, while at the same time artificially limiting prosecutors' options when future DWI is alleged. None of this was necessary to prevent the criminalization of theoretical dangers.

## A. Child Abuse with Respect to Past and Present DWI

Shortly after the decision in *Etsitty*, the New Mexico Court of Appeals in *State v. Orquiz*<sup>94</sup> affirmed a conviction where the state relied solely on a DWI charge to establish the "substantial and foreseeable risk" required of felony child abuse.<sup>95</sup> To reach this result, the court cited its dicta from *Etsitty* for the proposition that "[c]learly, had [the d]efendant carried out his intentions and begun to drive with his child in the car, or had there been evidence that [the d]efendant was driving while intoxicated prior to his contact with police, he could have been convicted of child abuse by endangerment."<sup>96</sup> Implicit in this statement, according to the court, "is the conclusion that driving a moving vehicle while intoxicated *in and of itself* exposes a child passenger to a substantial risk of harm."<sup>97</sup>

The *Orquiz* court's analysis ignores some important issues. First, criminal liability is "[t]ypically . . . premised upon a defendant's culpable conduct, the actus reus, coupled with a defendant's culpable mental state, the mens rea."<sup>98</sup> While an allegation of past DWI is a strict liability misdemeanor, "the [s]tate cannot prove child abuse by endangerment unless [the defendant's] culpable mental state coincided with the act."<sup>99</sup> Unlike DWI, child abuse by endangerment is a third degree felony that requires the state to prove that the defendant, with reckless disregard, put a child at substantial and foreseeable risk.<sup>100</sup> Writing for the *Albuquerque Jour-*

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94. 2012-NMCA-080.

95. *Id.* ¶ 7 n.1 ("The State's arguments below and on appeal are thus premised solely on its view that Defendant's DWI alone supports his child abuse conviction.").

96. *Id.* ¶ 14 (quoting *Etsitty*, 2012-NMCA-012, ¶11) (alteration in original).

97. *Id.* ¶ 15 (emphasis added).

98. *State v. Padilla*, 2008-NMSC-006, ¶ 12, 143 N.M. 310, 176 P.3d 299.

99. *Gonzales*, 2011-NMCA-081, ¶ 30.

100. See *supra* note 56 and accompanying text; *State v. Webb*, 2013-NMCA-027, ¶ 22, 296 P.3d 1247 ("The risk must be of such a nature and degree that the actor's failure to perceive it . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." (internal citation omit-

nal, Judge Malott of the Second Judicial District has explained the holding in *Orquiz* as follows:

[I]t is extremely unlikely, though I suppose not impossible, that a person driving his or her own car is not aware they have children on board as they proceed to commit DWI, so knowing or negligent conduct sufficient for abuse by endangerment is implied from the child's presence in a defendant's moving vehicle.<sup>101</sup>

Despite this gloss, the question is not whether the accused knows that a child is present in the vehicle but whether the accused "knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child."<sup>102</sup> The problem with Judge Malott's explanation, and more broadly, the problem with *Orquiz* and with *Etsitty* itself, becomes evident when one considers that New Mexico's DWI "per se"<sup>103</sup> provision allows a jury to find a defendant guilty of DWI based on a bare finding that the defendant drove a motor vehicle with a blood alcohol concentration of .08 or more.<sup>104</sup>

Thus, with the per se provision, the state need not establish that the defendant drove impaired, drove recklessly or that the defendant's ability

ted)); *Santillanes*, 1993-NMSC-012, ¶ 29, 115 N.M. 215 ("[T]o satisfy the element of negligence in Section 30-6-1(C), we require that the defendant knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child."); UJI 14-604 NMRA (to find that a defendant acted with reckless disregard, a jury must determine that "defendant knew or should have known the defendant's conduct created a substantial and foreseeable risk, the defendant disregarded that risk and the defendant was wholly indifferent to the consequences of the conduct and to the welfare and safety of [the child].").

101. Alan M. Malott, *DWI often intersects with child abuse in court cases*, ALBUQUERQUE J., (Sept. 2012), <http://www.abqjournal.com/main/2012/09/24/biz/dwi-often-intersects-with-child-abuse-in-court-cases.html>.

102. *Santillanes*, 1993-NMSC-012, ¶ 29, 115 N.M. 215; see also *State v. Schaaf*, 2013-NMCA-082, ¶ 12, 308 P.3d 160, 165 (factoring in the defendant's "recognition and admission regarding the serious nature of the real risks of harm present . . . and the potential injury or death that the children were exposed to" in finding the defendant had acted with reckless disregard to the safety of the child).

103. NMSA 1978, § 66-8-102(C)(1).

104. UJI 14-4503 NMRA. Under a separate provision, offenders who drive a commercial vehicle can be charged with DWI at an alcohol concentration of .04. NMSA 1978, § 66-8-102(C)(2). After *Etsitty* and *Orquiz*, this presumably has the bizarre effect of recognizing a per se "substantial and foreseeable risk" to children who ride with drivers of commercial vehicles at half the alcohol concentration of drivers of noncommercial vehicles. While the commercial/noncommercial distinction may make sense in the realm of DWI liability, it has little apparent connection with the level of risk to the children riding in the vehicles.

to drive was adversely affected in any way.<sup>105</sup> The state need not establish that the defendant knew or should have known of the danger involved in driving.<sup>106</sup> Indeed, “[i]n a per se jurisdiction, DWI is an absolute liability offense requiring no culpable mental state. Signs of intoxication, as witnessed by prosecution witnesses, are irrelevant . . .”<sup>107</sup> The critical issue at trial and upon review is generally limited to the accuracy of the chemical test.<sup>108</sup> It thus makes little sense to decide, as a categorical rule, that an offense requiring no mens rea can automatically substitute for the substantial and foreseeable risk requirement of *Chavez*, which was designed precisely to ensure that the state actually put forward evidence that a child was at risk from a real danger, and that the defendant knew or should have known about this risk.<sup>109</sup>

Moreover, in New Mexico, defenses to a DWI violation are limited. For instance, while a defense of involuntary intoxication would technically be available to negate the element of criminal negligence under the child abuse statute, it is unavailable as a defense against strict liability DWI.<sup>110</sup> A defense of “entitlement” to a correct dosage of prescription drug is likely to be similarly discarded.<sup>111</sup> Thus, by predicating child abuse on DWI alone, *Etsitty* and *Orquiz* appear to eliminate defenses that

105. *State v. Gurule*, 2011-NMCA-042, ¶ 11, 149 N.M. 599, 252 P.3d 823 (“[T]he only thing necessary to convict a person of DWI is proof that the defendant was driving a vehicle either under the influence of intoxicating liquor or while he had a certain percentage of alcohol in his blood.” (emphasis added) (internal quotation marks and citation omitted)).

106. *Harrison*, 1992-NMCA-139, ¶ 21, 115 N.M. 73 (holding that no specific mens rea is required to support a conviction under the per se provision).

107. E. John Wherry, Jr., *The Rush to Convict DWI Offenders: The Unintended Unconstitutional Consequences*, 19 U. DAYTON L. REV. 429, 433 (1994) (internal quotation marks and footnote omitted).

108. See, e.g., *State v. Martinez*, 2002-NMCA-043, ¶ 10, 132 N.M. 193, 45 P.3d 41 (“Defendant argued that no rational jury could relate his .09 BAC test results back to the alleged time of driving”); *State v. Watkins*, 1986-NMCA-080, ¶ 15, 104 N.M. 561, 724 P.2d 769 (Defendant argued that breath tests were not administered in compliance with regulations); see generally *Challenges and Defenses II: Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases* (NHTSA), Mar. 2013.

109. *Chavez*, ¶ 22, 2009-NMSC-035, 146 N.M. 434 (“[T]o find that the accused acted with the requisite mens rea, the jury is instructed that it must find that defendant’s conduct created a substantial and foreseeable risk of harm.” (internal quotation marks and citation omitted)).

110. *Gurule*, 2011-NMCA-042, ¶ 19, 149 N.M. 599.

111. “Entitlement” is a mens rea defense that applies “when a defendant presents a valid prescription or [over the counter] purchase to the jury as justification for the medications found in his system.” *Challenges and Defenses II: Claims and Responses to Common Challenges and Defenses in Driving While Impaired Cases* (NHTSA),



would normally be available to negate the criminal negligence mens rea of felony child abuse.<sup>112</sup>

Under the principles articulated in *Etsitty* and *Orquiz*, a prosecutor can effectively employ the DWI per se provision to import a nonculpability, strict liability standard into the crime of felony child abuse, which is punishable by three years imprisonment and a \$5,000 fine.<sup>113</sup> In addition to constituting a misapplication of the child abuse statute, this degree of penalty is atypical for a strict liability crime.<sup>114</sup>

The second, and more fundamental problem with the court's determination that past and present DWI "in and of itself" exposes a child-passenger to a substantial and foreseeable risk of harm is that it ignores the supreme court's express language in *Chavez*:

We have also relied on the Legislature's independent assessment that conduct is inherently perilous when evaluating endangerment convictions. Where a defendant's underlying conduct violates a separate criminal statute, such legislative declaration of harm may be useful, *though not dispositive*, to an endangerment analysis when the Legislature has defined the act as a threat to public health, safety, and welfare.<sup>115</sup>

Thus, while a defendant's violation of other criminal prohibitions may serve as a factor in the endangerment analysis, *Chavez* appropriately requires courts to also consider the gravity of the potential harm created by the defendant and the likelihood of harm posed to the child on a case-by-case basis.<sup>116</sup> As a practical matter, situations occasionally arise where a defendant may cross the culpability threshold required to violate a sepa-

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Mar. 2013, at 1. Entitlement is not a legally recognized defense to strict liability DWI. *Id.*

112. See generally Wherry, *supra* note 107, at 437 (When a per se violation is alleged "few, if any, defenses are available.").

113. NMSA 1978, § 30-6-1(E) ("A person who commits abuse of a child that does not result in the child's death or great bodily harm is, for a first offense, guilty of a third degree felony . . ."); NMSA 1978, § 31-18-15(A)(9) and (E)(9) (defining penalties for noncapital felonies).

114. *Santillanes*, 1993-NMSC-012, ¶ 27, 115 N.M. 215 ("Penalties for . . . crimes having no element of mens rea, that is, strict liability crimes, have traditionally been relatively slight." (citing *Morrisette v. United States*, 342 U.S. 246, 255 (1952))); see generally Wayne R. LaFave, *Criminal Law* § 5.5 (West) (5th ed. 2010) ("Usually, but not always, the statutory crime-without-fault carries a relatively light penalty—generally of the misdemeanor variety.").

115. 2009-NMSC-035, ¶ 25, 146 N.M. 434 (emphasis added) (citation omitted).

116. *Id.* ¶¶ 24–26, 146 N.M. 434; see also *Gonzales*, 2011-NMCA-081 ¶ 17, 150 N.M. 494 (the likelihood that harm will occur remains a particularly pertinent consideration in endangerment cases "where the risk of harm is too remote, which may

rate criminal statute without demonstrating the requisite criminal negligence of felony child abuse.<sup>117</sup> There is no indication that *Chavez* exempts the state from producing evidence sufficient to allow the jury to weigh the substantial and foreseeable risk factors—all three of them—in every case.<sup>118</sup> Prior to *Etsitty* and *Orquiz*, neither the court of appeals nor the New Mexico Supreme Court had ever recognized that DWI “in and of itself” is enough to support a child abuse by endangerment conviction.<sup>119</sup> Particularly in light of the restrictive approach to the statute taken in *Chavez*, this portion of the decision in *Etsitty* and its subsequent adoption in *Orquiz* is misguided.

### B. Child Abuse with Respect to Future DWI

Darwin Etsitty completed a series of affirmative acts when he drank to intoxication, stepped out of his home, loaded his child—unrestrained—into his truck, and took his keys in hand in preparation to drive to the store.<sup>120</sup> In defense, Etsitty framed the issue to the court of appeals as a question of “whether a child is in danger when the automobile is not in motion, or whether the statute actually requires the car to be driven erratically for a charge of child abuse to be sustained.”<sup>121</sup> The court answered in the negative to both options, electing instead to categorically define child abuse at the point when an intoxicated person begins to drive—whether erratically or not.<sup>122</sup> In its effort to create bright-line standards for predicated felony child abuse on DWI, the court has thus winnowed away any room for case-by-case analysis of whether actual danger is present—the very analysis that the supreme court deemed necessary in *Chavez*.<sup>123</sup>

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indicate that the harm was not foreseeable” (internal quotation marks and citation omitted)).

117. *E.g.*, *State v. Clemonts*, 2006-NMCA-031, 139 N.M. 147, 130 P.3d 208 (finding insufficient evidence of child endangerment when defendant committed minor traffic violations while evading police officers during a low-speed chase with children in the car).

118. *See supra* note 56.

119. Opinions predating *Etsitty* always cited the presence of danger to the child, independent of the DWI itself. *See, e.g.*, *Chavez*, 2009-NMCA-089, ¶ 14, 149 N.M. 729 (defendant drove drunk and stipulated that she was impaired and that her conduct was dangerous); *Wachman*, 2005-NMCA-125, ¶¶ 4–5, 138 N.M. 488 (defendant drove drunk to a bar and left her child unattended in a dangerous parking lot); *State v. Castaneda*, 2001-NMCA-052, ¶¶ 19–22, 130 N.M. 679, 30 P.3d 368 (defendant drove drunk on the wrong side of a divided highway). *Etsitty*, 2012-NMCA-012, ¶ 8.

120. *See supra* text accompanying notes 60–63.

121. Brief of Defendant-Appellant at 11, *State v. Etsitty*, No. 30,779.

122. *See supra* text and accompanying notes 92.

123. *See supra* text and accompanying notes 56–57.

At its core, *Etsitty* categorically bars child endangerment convictions based on acts of driving that have not yet occurred. The court of appeals has manufactured a standard that prevents the state from distinguishing between levels of culpability of actual physical control offenders who intend to drive alone and those who intend to drive with children.<sup>124</sup> The *Etsitty* holding was said to prevent the holding in *Sims* from transforming child endangerment based on future DWI into an unintended attempt crime.<sup>125</sup> However, the fundamental problem is not the “attempt” formulation that results from the intent requirement of *Sims*. Child abuse by endangerment does rely, to some extent, on potential future conduct.<sup>126</sup> When applying the statute, New Mexico courts must routinely determine when a defendant has sufficiently acted to put a child at risk, even when further action remains untaken.<sup>127</sup>

Like Judge Hynes at the district court level, the court of appeals was understandably concerned with the prospect of basing felony liability on a child’s mere presence with an intoxicated adult in a nonmoving vehicle.<sup>128</sup> Of course, the potential for criminalizing remote harms is a direct result of enacting abstract endangerment offenses.<sup>129</sup> This potential, as the *Etsitty* court was well aware, is magnified when one abstract offense is premised on another.<sup>130</sup> By definition, child abuse by endangerment is a step removed from actual harm.<sup>131</sup> If it were based entirely on DWI by actual physical control, it would be two steps removed from actual harm.<sup>132</sup> In other words, the court understood that a defendant could be convicted of a felony based on an overt act in furtherance of committing the crime of DWI, which, were it to occur, might endanger a child’s life or health. This was rightfully troubling to the court of appeals, particularly in

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124. *Id.* ¶ 14.

125. *See supra* text accompanying notes 84–85.

126. Under the child abuse standard, “an accused’s culpability is premised upon the *degree* of danger created by his conduct.” *Chavez*, 2009-NMSC-035, ¶ 15, 146 N.M. 434.

127. *State v. McGruder*, 1997-NMSC-023, ¶¶ 46–48, 123 N.M. 302, 940 P.2d 150 (defendant’s act of threatening to kill child’s mother with child nearby found sufficient); *Ungarten*, 1993-NMCA-073, 115 N.M. 607 (defendant’s act of brandishing a knife with child nearby found sufficient).

128. *See supra* text and accompanying note 74.

129. *See generally* Andrew von Hirsch, *Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation*, in *HARM AND CULPABILITY* 260–64 (A.P. Simester & A.T.H. Smith eds., 1996).

130. *See supra* text and accompanying notes 83–86.

131. *See supra* text and accompanying note 45.

132. *See Etsitty*, 2012-NMCA-012, ¶ 11 (“[W]ithout evidence of actual driving, Defendant had not yet put the child in real peril.”).

light of the supreme court's recent restriction on the criminalization of theoretical dangers laid out in *Chavez*.<sup>133</sup>

However, the *Etsitty* court ignored safeguards against the criminalization of theoretical dangers that had already been carefully developed in *Sims*<sup>134</sup> and *Chavez*.<sup>135</sup> There was no need to reinvent the wheel by creating a bright-line standard that artificially distinguishes between categories of DWI. Indeed, the crime of future DWI is alive and well, and it continues to serve its purpose in "protect[ing] the health, safety, and welfare of the people of New Mexico."<sup>136</sup> The *Sims* court declined the opportunity to bury the doctrine of actual physical control, instead crafting an intent element and "increas[ing] the evidentiary burden on the [s]tate" in order to ensure that defendants were not being convicted of DWI based on what they might do.<sup>137</sup> In theory, with the intent requirement in place, there is little difference in the substantiality and foreseeability of risk created by DWI offenders who actually drive and those who establish actual physical control in preparation to immediately begin driving.<sup>138</sup> This is not the proper place to draw the line for felony liability.

Moreover, to provide further protection for defendants, the court of appeals (and Judge Hynes) could simply have demanded the level of proof required by *Chavez*. After all, the supreme court did more than just abstractly refer to its goal of preventing the criminalization of theoretical dangers; *it developed a test*.<sup>139</sup> The requirement that sufficient evidence is provided to the jury to measure the gravity and likelihood of harm is a fairly standard test employed to ensure that prohibitions are not addressing harms that are too remote.<sup>140</sup> In *Chavez*, the supreme court reversed the defendant's conviction because the state failed to articulate specific

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133. See *supra* note 75 and accompanying text.

134. 2010-NMSC-027, ¶ 4, 148 N.M. 330 ("[A] fact finder cannot simply assume or speculate that the individual in question might sometime in the future commence driving his or her vehicle.").

135. See *supra* text and accompanying notes 56–57.

136. *Sims*, 2010-NMSC-027, ¶ 29, 148 N.M. 330 (internal quotation marks and citation omitted).

137. *Id.* ¶¶ 4, 38, 148 N.M. 330 ("A finding that there [is] nothing to prevent [the defendant] from . . . driving is now inadequate" (internal quotation marks and citation omitted)).

138. Specifically, *Sims* requires that "[t]he prosecution must establish, based on the totality of the circumstances, that the accused was actually, not just potentially, exercising control over the vehicle with the general intent to drive so as to pose a real danger to himself, herself, or the public." *Id.* ¶ 34, 148 N.M. 330.

139. See *supra* text and accompanying notes 56–59.

140. The primary step in a harms analysis is to "[c]onsider the gravity of the eventual harm, and its likelihood. The greater the gravity and likelihood, the stronger the case for criminalization." Hirsch, *supra* note 129 at 261.

dangers to the jury and failed to provide accompanying evidence to help the jury weigh the substantiality and foreseeability of those dangers.<sup>141</sup> The *Etsitty* court (and Judge Hynes) could—and should—have done the same.

## CONCLUSION

With the bright-line standard developed in *Etsitty* and *Orquiz*, the court of appeals has essentially enacted its own relatively draconian DWI endangerment law. This is contrary to the holdings of the New Mexico Supreme Court in *Chavez* and *Sims* and contrary to the intent of the legislature, which has killed previous attempts at similar enactments.<sup>142</sup> Despite *Etsitty* and *Orquiz*, child abuse cannot act as a bright-line, per se felony enhancement to DWI in New Mexico. Not yet. New Mexico's child abuse statute requires a level of proof inconsistent with the current DWI statute. If the community (through its elected representatives) wishes to prosecute drunks who drive with children in a bright-line, strict liability fashion, there are a panoply of tried and tested statutes from other jurisdictions available to serve as models. Only a statutory regime can enable prosecutors to punish DWI offenders who expose children to danger while adequately protecting defendants' right to due process. In other words, the solution for appropriately dealing with drunks who drive with children should be crafted in the Roundhouse, not the courthouse.

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141. See *supra* note 59 and accompanying text. While, as a practical matter, this might require the state to produce eyewitnesses to testify to road conditions and to the defendant's level of impairment, or expert witnesses to testify to the dangers of driving at different levels of blood or breath alcohol content, such is the price for adequately proving felony conduct and condemning a member of society as a felon. This is exactly the type of specificity that was required in *Chavez* itself. *Id.*

142. See *supra* notes 21 & 23.