Who Framed Robert Devereaux? *Devereaux v. Perez*, a Deliberate Indifference Standard, and a Right Not to Be Framed in the Context of Child Sexual Abuse Investigations

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INTRODUCTION

George Burroughs was a minister who had dedicated his life to helping the less fortunate. He was also a victim of the Salem witchcraft hysteria of the late seventeenth century. In April 1692, Ann Putnam, one of the girls being tortured by the "witches" of the town, told her father that she had seen the specter of a minister, who had tried to get her to sell her soul to the devil. The minister told her that his name was George Burroughs, that he was a conjurer, and that he had killed two of his wives by bewitchment, in addition to having killed two other people. Ann's father, Thomas Putnam, a prosecutor in the witchcraft trials, took Ann's deposition of the above claims and had her sign it.

His daughter's accusations were just what Putnam needed. He and the other prosecutors were looking for a man, mentioned by several of the afflicted girls, who was a leader in the Satanic rituals and who, if found, would "cause a commotion of such vast magnitude that the people would believe anything that was put before them." A week later, the magistrate issued an arrest warrant for Burroughs and the marshal promptly arrested him. At Burroughs's hearing, the afflicted girls had fits and accused Burroughs of crimes such as
leading a witch's meeting in a field. In August 1692, the prosecutors brought Burroughs to trial. During the trial, the afflicted girls put on a great commotion and twisted Burroughs's incredible feats of strength against him, using them to show his relationship with the devil. The court found Burroughs guilty, and on August 19, 1692, Burroughs and four other prisoners were hanged on Gallows Hill.

Besides the tragic ending, Burroughs's story is not that different from that of Robert Devereaux three centuries later. Instead of being a victim of the Salem witchcraft hysteria, Robert Devereaux was a victim of the Wenatchee, Washington child abuse hysteria. In this hysteria, public officials wrongly charged Devereaux and about forty other adults with over 29,000 counts of child sexual molestation. The officials charged and arrested Devereaux on the basis of evidence just as tenuous, flimsy, and unbelievable as that which the seventeenth-century prosecutors used to convict and hang George Burroughs. Unlike the Burroughs case, however, the officials ultimately dropped all of the charges against Devereaux and released him.

Child sexual abuse is unquestionably a serious contemporary social problem. Another serious problem, however, is the response by officials to allegations of child sexual abuse, which has been compared to the witch-hunts of the seventeenth century. In many cases, as Robert Devereaux's case exemplifies, this comparison is, unfortunately, all too accurate. Overzealous prosecutors and social workers often prosecute defendants who may be innocent in an attempt to rid the world of child sexual abuse offenders. Much of the danger of such overzealousness on the part of state officials can

8. See id. at 59–60.
9. See id. at 106.
10. See id. at 107.
11. See id. at 107, 114–15.
12. See Devereaux v. Perez, 218 F.3d 1045 (9th Cir. 2000).
13. See id. at 1047–50.
14. See id. at 1050.
15. See id.
17. See Matt O'Connor & Kim Barker, Judge Rips DCFS Probes: System Ruled Unconstitutional, CHI. TRIB., April 3, 2001, available at http://pqasb.pqarchiver.com/chicagotribune/ (discussing a ruling by U.S. District Court Judge Rebecca Pallmeyer which stated that the Illinois Department of Children and Family Services' system for investigating allegations of child abuse and neglect is unconstitutional and that it has "too often led to false accusations of wrongdoing against child caretakers").
be attributed to the way in which prosecutors and other child sexual abuse investigators can manipulate and coerce child witnesses during interrogations of the children.\textsuperscript{18} Because of children's vulnerability, immaturity, and impressionability, the manner in which investigators interview children has a direct effect on their credibility, and the use of improper investigatory techniques can make children's statements about abuse unreliable.\textsuperscript{19} As the New Jersey Supreme Court has stated, "[t]hat an investigatory interview of a young child can be coercive or suggestive and thus shape the child's responses is generally accepted."\textsuperscript{20}

Prosecutors and other officials have great opportunity to manipulate children's statements during child sexual abuse interrogations.\textsuperscript{21} If officials take advantage of this opportunity, defendants charged with abuse could be wrongfully convicted. Thus, the way in which officials interview children in sexual abuse cases has serious due process implications.\textsuperscript{22} By impeding the search for truth in litigation, the pretrial interviewing of children can violate a defendant's due process rights.

In Devereaux v. Perez,\textsuperscript{23} the Ninth Circuit addressed the question of whether there exists a "constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol."\textsuperscript{24} The court held that there is no such constitutional right, and thus the doctrine of qualified immunity protected the defendants from liability.\textsuperscript{25} The court reasoned that standards for how child witnesses should be

\begin{footnotesize}
\begin{enumerate}
\item See State v. Michaels, 642 A.2d 1372, 1377 (N.J. 1994).
\item See id. at 1376–79; see also Terence W. Campbell, Smoke and Mirrors: The Devastating Effects of False Sexual Abuse Claims 61 (1998) ("Rather than carefully identify the circumstances surrounding how an allegation developed, [professionals assessing allegations of sexual abuse] immediately proceed with interviewing the child premised on what they think they know. Approaching interviews in this manner leads professionals into committing one blunder after another, and quite frequently, these blunders so severely contaminate the entire investigation that they cannot be corrected.").
\item Id.
\item See Clifton M. Dugas, II, Note, State of New Jersey v. Michaels: The Due Process Implications Raised in Interviewing Child Witnesses, 55 La. L. Rev. 1205, 1223 (1995) ("A due process fairness question clearly arises in the context of suggestive interview techniques. Regardless of one's personal position on the degree of tolerance for police impropriety, it is certain that improperly conducted child interviews can result in unfairness to the accused individual.").
\item 218 F.3d 1045, 1053 (9th Cir. 2000).
\item Id.
\item See id. at 1056.
\end{enumerate}
\end{footnotesize}
interviewed in sexual abuse cases are not established clearly enough to allow for the finding of a right to have children interviewed in a particular way.26 Although the investigation in the case was “far from textbook perfect,” the court concluded that it was not so “outrageous” that it violated traditional notions of due process.27

Part I of this Comment presents the facts of Devereaux v. Perez and the ruling and reasoning of the Ninth Circuit majority and dissenting opinions in the case. Part II outlines the background necessary to analyze the Ninth Circuit’s approach to the issue of whether there was a constitutional violation in Devereaux. It introduces 42 U.S.C. § 1983, the statute under which Devereaux brought suit, and the doctrine of qualified immunity, which the court in Devereaux used to determine whether there was a violation of a right and how specifically or generally the right at issue should be framed. Part III considers the approach the court used in deciding Devereaux v. Perez and examines two flaws in the court’s reasoning and conclusion. Part III suggests that both the intent standard the court required in order to show a violation of the right at issue and the way in which the court framed the right at issue in the case give too much protection to state officials investigating child sexual abuse cases and too little protection to those accused of child sexual abuse.

I. DEVEREAUX V. PEREZ

A. Facts

Devereaux v. Perez arose out of several criminal child sexual abuse charges brought against Robert Devereaux.28 Devereaux, the plaintiff, was a foster father caring for a number of young girls.29 In August 1994, one of Devereaux’s foster girls was placed in juvenile detention because she had tried to poison Devereaux and another foster girl.30 While in juvenile detention, a police detective, instead of asking the girl about the attempted poisoning, questioned her about whether Devereaux had ever sexually abused her.31 The girl denied

26. Id.
27. Id.
28. See id. at 1050.
29. See id. at 1047.
30. See id. at 1048.
31. See id.
that Devereaux had abused her, but later recanted and stated that he had.32 The next day she was interviewed by a social worker and said that the police detective had pressured her into accusing Devereaux the previous day and had made her lie.33 At a subsequent interview the child stated that the police detective "'make[s] all the children lie'" and again insisted that Devereaux had not raped her.34 The police detective then threatened the girl with criminal prosecution if she recanted her previous testimony that Devereaux had raped her.35 After this threat, the girl stated that her exculpatory statements about Devereaux had been a lie.36

Officials interviewed several other foster children under Devereaux's care and all of these interviews followed the same basic pattern.37 When first questioned by detectives and social workers, the girls would deny ever having been sexually abused by Devereaux.38 However, after being subjected to extensive questioning and outrageous interviewing techniques, the girls would recant their denials and state that Devereaux had abused them.39 The investigators repeatedly refused to accept the girls' denials of abuse.40

One of the girls, who had repeatedly denied that Devereaux had ever sexually abused her, was held at the police station for six hours, until 11:00 P.M., when she finally stated that Devereaux had abused her.41 Later, she admitted that she made this statement "only because she was 'sick and tired' of being interrogated."42 Yet another foster girl, who also repeatedly denied having been sexually abused by Devereaux and denied having seen him abuse any of the other girls, was removed from Devereaux's home and placed in the home of the detective working on the case.43 Seven months later, while still living at the detective's house, she "changed her story."44 She claimed that beginning when she was two years old, she had participated in group

32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id. at 1048–50, 1058 (Kleinfeld, J., dissenting).
38. Id. at 1048–49, 1058 (Kleinfeld, J., dissenting).
39. Id. at 1048–49, 1058–59 (Kleinfeld, J., dissenting).
40. See id. at 1048–49.
41. Id. at 1049.
42. Id.
43. Id.
44. Id.
sex orgies in many different locations and implicated, among others, her parents, siblings, grandparents, neighbors, cab drivers, Salvation Army employees, other children, and Devereaux. These incredible assertions provided the basis for some of the child molestation charges against Devereaux.

According to the dissent in Devereaux, the above examples are only a few illustrations of the coercive, threatening conduct that investigators used with many of Devereaux's foster girls. Furthermore, in addition to employing these highly improper interview techniques in the case against Devereaux, the investigators also withheld from Devereaux and his counsel the exculpatory statements made by the foster girls in the interviews.

Officials arrested Devereaux multiple times and charged him with numerous counts of rape of a child, child molestation, and tampering with a witness. After an investigation, with the charges against Devereaux pending for over a year, all of the charges against him were dropped pursuant to a plea agreement in which Devereaux pled guilty to one count of rendering criminal assistance and one count of fourth degree assault for having spanked one of his foster girls. The district court decided that the charges were dropped because of lack of evidence.

Devereaux then brought suit against the investigators under 42 U.S.C. § 1983, asserting that they had violated his Fourteenth Amendment rights by manipulating and coercing the foster girls to give false evidence against him and by withholding and ignoring exculpatory evidence. The US District Court for the Eastern District of Washington granted summary judgment for all of the defendants. Devereaux then appealed the district court's dismissal of his section 1983 claim.

45. Id.
46. Id.
47. Id. at 1058–59 (Kleinfeld, J., dissenting).
48. Id. at 1049–50 nn.5–6, 8.
49. Id. at 1049–50.
50. Id. at 1050.
51. Id.
52. Id. at 1047, 1050–51.
53. Id. at 1051.
54. Id.
B. Ninth Circuit Opinion

The Ninth Circuit Court of Appeals affirmed the district court's decision and dismissed Devereaux's suit, concluding that the defendants were entitled to qualified immunity.\textsuperscript{55} Qualified immunity protected the defendants because, as the court determined, Devereaux failed to show that the defendants violated a constitutional right that was sufficiently established so that a reasonable official would understand that a due process right had been violated.\textsuperscript{56} The court declared that "there is no constitutional due process right to have child witnesses, in a child sexual abuse investigation, interviewed in a particular manner or pursuant to a certain protocol."\textsuperscript{57} In its decision, the court admitted that the record revealed an investigation "which was far from textbook perfect," but stated that "[t]he constitutional dimensions of investigatory techniques employed to discover child sexual abuse are simply not clearly established."\textsuperscript{58} In support of its holding, the court cited to several federal circuit courts of appeals decisions, all holding that improper interviewing of child witnesses in sexual abuse cases does not give rise to a due process violation.\textsuperscript{59}

According to the court, Devereaux's asserted right to have child witnesses interviewed in such a way as to avoid leading questions or influencing the children was too vague and abstract—it was a "nebulous, unconstrained abstract constitutional right" that would give rise to the basically unqualified liability of officials.\textsuperscript{60} Furthermore, the court concluded that the evidence Devereaux presented was also too general and insufficient to support his claim that he was deprived of any particularized due process right.\textsuperscript{61}

The court did concede that state officials investigating child sexual abuse cases may be held liable for violations of "cognizable constitutional rights."\textsuperscript{62} According to the court, there is a well-established right to be free from the knowing use of false or perjured

\textsuperscript{55} Id. at 1053–54, 1057.
\textsuperscript{56} Id. at 1053.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 1056.
\textsuperscript{59} Id. at 1053–54 (citing Watterson v. Page, 987 F.2d 1 (1st Cir. 1993); Doe v. State of Louisiana, 2 F.3d 1412 (5th Cir. 1993); Frazier v. Bailey, 957 F.2d 920 (1st Cir. 1992); Stem v. Ahearn, 908 F.2d 1 (5th Cir. 1990); Myers v. Morris, 810 F.2d 1437 (8th Cir. 1987)).
\textsuperscript{60} Id. at 1054.
\textsuperscript{61} Id. at 1054–55.
\textsuperscript{62} Id. at 1055.
证据在刑事诉讼中的应用。然而，法院认定，这种宪法权利在本案中不适用，因为没有证据表明被告故意提供了被用于起诉德韦洛的虚假证据。

C. 持异议意见

在异议中，法官安德鲁·克莱因菲尔德（Andrew Kleinfeld）主张，被告享有不被“定罪”的宪法权利，州官员应该知道这一点，德韦洛提供了足够的证据，证明被告故意胁迫儿童证人作假证以起诉他。异议强调了这样一个原则：官员不会因为具体行为没有被先前的判例宣告为不法行为而受到保护。法官克莱因菲尔德认为，多数意见忽视了这一原则，实际上认为，为了发现宪法侵权，必须有先前判例表明在本案中被告的审问方式违反了正当程序权。

根据异议，法院应关注的是，被告是否违反了德韦洛的正当程序权，以一种合理人在被告的立场上会意识到的方式。任何合理官员都会知道，被告有不被定罪或不被制造虚假证据的权利，但被告在案件中故意胁迫儿童证人说谎以起诉德韦洛。

II. 自愿及受迫自白的辩护

第1983条是被最广泛用来为政府官员剥夺联邦宪法权利的行为提供补救的手段之一。第1983条下的每个行为者均被视为在行使国家权力时的行为者。第1983条规定的“每一个行为者”行事须在行使国家权力时。

63. Id.
64. Id. at 1056.
65. Id. at 1057 (Kleinfeld, J., dissenting).
66. Id. at 1059 (Kleinfeld, J., dissenting).
67. Id. at 1060 (Kleinfeld, J., dissenting).
68. Id. at 1061 (Kleinfeld, J., dissenting).
69. Id. at 1061–62 (Kleinfeld, J., dissenting).
state law liable for depriving any other person in the United States of "any rights, privileges, or immunities secured by the Constitution and laws." To recover damages against a government official under section 1983, a plaintiff must establish that a constitutional right exists, that the defendant violated that right under color of state law, and that the defendant's acts proximately caused the plaintiff's injury. In addition to fulfilling these three requirements, to succeed under a section 1983 claim the plaintiff must "maneuver" around a significant "barrier" to recovery, the doctrine of qualified immunity.

Qualified immunity is a defense to civil rights claims brought under section 1983. "[I]t stands as a legal principle defined primarily by the Court's own policy judgment that an individual's right to compensation for constitutional violations and the deterrence of unconstitutional conduct should be subordinated to the governmental interest in effective and vigorous execution of governmental policies and programs." The Supreme Court first acknowledged the qualified immunity defense in *Pierson v. Ray,* where it held that the defense of good faith and probable cause is available to police officers in a section 1983 action. The current statement of the qualified immunity standard is described in *Harlow v. Fitzgerald* and *Anderson v. Creighton.*

In *Harlow,* the US Supreme Court reformulated the qualified immunity doctrine, abandoning the subjective portion of the qualified

70. The statute provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.


72. Id. at 271 ("In addition to establishing the violation of an existing constitutional right, the plaintiff must also maneuver through an elaborate maze of constitutional remedies doctrine that imposes substantial barriers on the road to recovery. Among the most important of these barriers is qualified immunity.").


75. 386 U.S. 547 (1967).

76. See id.

77. 457 U.S. 800.

immunity test that it had established in *Wood v. Strickland* and articulating an objective inquiry.\(^79\) The Court held that "government officials performing discretionary functions[] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."\(^80\) The purpose of this new, solely objective test was to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."\(^81\) The Court also noted, however, that by framing the qualified immunity standard in objective terms, it was not providing any "license to lawless conduct": "The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."\(^82\) The *Harlow* Court's reformulation of the qualified immunity test into a purely subjective inquiry "demonstrates the Supreme Court's increased sensitivity to the costs to defendants of defending against § 1983 litigation[,] at the same time showing the Court's reduced concern for the financial and psychological costs to § 1983 plaintiffs of conducting such litigation."\(^83\)

In *Anderson v. Creighton*, the Court "adopted a more fact-specific approach to the objective qualified immunity test" and continued its movement in a "prodefendant direction."\(^84\) The Court stated in *Anderson*, "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."\(^85\) Qualifying this statement, however, the Court noted, "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent."\(^86\)

The Supreme Court made clear in *Wilson v. Layne* that when evaluating a qualified immunity claim, the court must first decide

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80. *Id.*
81. *Id.*
82. *Id.* at 819.
84. *Id.* at 8-35, 8-37 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).
85. 483 U.S. at 640.
86. *Id.* (citations omitted).
whether the plaintiff has alleged a violation of a constitutional right.\textsuperscript{87} If the plaintiff has alleged the deprivation of a constitutional right, then the court must determine whether the right was clearly established at the time of the violation.\textsuperscript{88} Generally, "the answer to the question of whether the right was clearly established will be a function of how narrowly the 'contours' of the particular right are drawn when framing the inquiry."\textsuperscript{89}

The Supreme Court has articulated several rationales for using qualified immunity to shield public officials from section 1983 liability.\textsuperscript{90} One justification for qualified immunity is alleviating the "social costs" to individual defendants and government of claims brought against innocent officials.\textsuperscript{91} "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."\textsuperscript{92} This justification illustrates the Court's belief that qualified immunity is "necessary to screen out constitutional tort claims that might burden individual defendants and the government with resource-consuming litigation."\textsuperscript{93}

Another reason for protecting public officials with qualified immunity is the over-deterrence rationale: "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'"\textsuperscript{94} This rationale seeks to prevent the situation in which "a public official faced with a decision that could subject her to constitutional tort liability would, like a deer caught in the headlights, be inhibited from taking necessary action."\textsuperscript{95} A third reason for applying

\textsuperscript{87} 526 U.S. 603, 609 (1999); see also Baker v. McCollan, 443 U.S. 137, 140 (1979) (stating that the first step when analyzing a section 1983 claim is to "isolate the precise constitutional violation with which [the defendant] is charged."); Karen M. Blum, \textit{Qualified Immunity: A User's Manual}, 26 IND. L. REV. 187, 199 (1993) (stating that to meet the first prong of the qualified immunity test, the plaintiff must assert a "violation of a constitutional right under the law as presently construed").

\textsuperscript{88} See Wilson, 526 U.S. at 609; see also Blum, supra note 87, at 199–200 (stating that to satisfy the second part of the test, the plaintiff must "prove that the law regarding this right was clearly established at the time of the challenged conduct").

\textsuperscript{89} Blum, supra note 87, at 200.

\textsuperscript{90} See Chen, supra note 71, at 273 ("[T]he Court has identified three distinct policy justifications for qualified immunity ... fairness, overdeterrence, and litigation burdens.").

\textsuperscript{91} Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); see also Chen, supra note 71, at 275–76.

\textsuperscript{92} Harlow, 457 U.S. at 814; see also Chen, supra note 71, at 276.

\textsuperscript{93} Chen, supra note 71, at 276.

\textsuperscript{94} Harlow, 457 U.S. at 814 (citation omitted). See also Chen, supra note 70, at 275.

\textsuperscript{95} Chen, supra note 71, at 275; see also Scheuer v. Rhodes, 416 U.S. 232 (1974). In Rhodes, the Court stated:
qualified immunity to government conduct is based on fairness concerns. 96 It is unfair to subject government officials to liability for actions that do not clearly violate constitutional rights. 97 Furthermore, public officials, who "regularly face situations that require them to evaluate the application of some existing structure of law to new circumstances" 98 should not have to "predict[] the future course of constitutional law." 99

III. THE USE OF A DELIBERATE INDIFFERENCE STANDARD AND A RIGHT NOT TO BE FRAMED IN DEVEREAUX V. PEREZ

The majority in Devereaux v. Perez made two major errors, which led to its unjust dismissal of Devereaux's case. First, the majority erred in demanding too high a level of culpability. According to the majority, for Devereaux to have succeeded on his claim against the defendants, he would have had to show that the defendants knowingly used false evidence against him. The court was wrong to require a "knowing" intent level, instead of a lower, more plaintiff-friendly standard, such as deliberate indifference. Second, the majority defined the right at issue in the case too narrowly. The court wrongly focused on a right to have children interviewed in a certain way, instead of defining the right at issue more broadly as the right "not to be framed," 100 or a defendant's constitutional right not to have evidence fabricated against him and used to deprive him of his liberty. 101

[O]ne policy consideration seems to pervade the [immunity] analysis: the public interest requires decisions and action to enforce laws for the protection of the public. . . . Public officials . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.

Id. at 241-42.

96. Chen, supra note 71, at 273-75.
97. See id. at 273.
98. Id.
100. Devereaux v. Perez, 218 F.3d 1045, 1057 (9th Cir. 2000) (Kleinfeld, J., dissenting).
101. Note that because Devereaux's constitutional claim was dismissed on summary judgment, see supra p. 906, the truthfulness of the facts as alleged by Devereaux was never determined in a court of law. Thus, the author is assuming for purposes of the arguments made in this Comment that the facts as alleged by Devereaux, see supra Part I.A, are true.
A. The Intent Standard

The first error made by the court in Devereaux relates to the intent standard employed by the court. The majority in Devereaux, citing the Supreme Court case Pyle v. Kansas as authority, acknowledged that there is a constitutional right to be free from the knowing use of false evidence in a criminal case.¹⁰² Because there was not sufficient evidence to show that the defendants in Devereaux knowingly fabricated evidence in order to prosecute Devereaux, the court concluded that this constitutional right did not apply in the instant case.¹⁰³

The dissent apparently had no problem with this "knowing" standard imposed by the majority. Indeed, the dissent’s disagreement with the majority’s conclusion on this issue stemmed not from the fact that the court used a "knowing" standard, but rather from the majority’s finding that there was no evidence that the defendants knowingly deprived Devereaux of the right not to have evidence fabricated against him.¹⁰⁴

Although the dissent was correct in concluding that there was sufficient evidence that the defendants deliberately fabricated evidence against Devereaux, Judge Kleinfeld was wrong, as was the majority, in applying the "knowing" intent standard. In child sexual abuse cases, where the interrogation of child witnesses is in question, such a standard is too high and gives too much protection to state officials. Although the state has an important interest in protecting children from sexual abuse, it also has a significant interest in protecting defendants from officials who "[m]anufactur[e] false

¹⁰² See Devereaux, 218 F.3d at 1055 (citing Pyle v. Kansas, 317 U.S. 213 (1942)). In Pyle, the Court concluded that the knowing use of false or perjured testimony to convict a defendant and the deliberate suppression of exculpatory evidence by officials constituted a deprivation of constitutional rights. See 317 U.S. at 216.

¹⁰³ See Devereaux, 218 F.3d at 1056. The majority inappropriately glossed over the question of whether there was evidence that the defendants knowingly fabricated evidence against Devereaux. Instead of analyzing the evidence before it to determine whether the defendants knowingly framed Devereaux, the court simply made a conclusive and dismissive statement that "[t]he record before the court does not reveal any evidence giving rise to an inference that the Individual Defendants knowingly presented false evidence to be used in Devereaux's sexual abuse prosecution." Id. As the dissent pointed out, there was ample evidence to show that the defendants deliberately manufactured evidence, and the majority erred in ignoring this evidence. See id. at 1062 (Kleinfeld, J., dissenting).

¹⁰⁴ See id. (Kleinfeld, J., dissenting). The dissent correctly argued that the evidence presented by Devereaux clearly showed that the defendants deliberately fabricated evidence against Devereaux by coercing the child witnesses to lie in order to get Devereaux arrested. See id.
evidence and us[e] the criminal law system to ruin the lives of innocent people... The seriousness of a crime never justifies manufacturing evidence and convicting the innocent." In child sexual abuse cases, where the techniques employed by state officials to interview children are at issue, the standard required to prove a violation of the defendant’s due process right to not have evidence fabricated against him should be lower than a “knowing” standard.

1. Supreme Court Discussion of Intent Standard in Due Process Cases

In Daniels v. Williams, the Supreme Court held that the Due Process Clause is not implicated by lack of due care of an official who unintentionally causes injury to life, liberty, or property. More simply stated, a state official cannot be held personally liable for a due process violation if he is merely negligent in causing the deprivation of life, liberty, or property. In its opinion, the Court reasoned that traditionally, the due process guarantee has been invoked in cases where officials deliberately deprive a person of life, liberty, or property. This tradition reflects the principle that the Due Process Clause was “‘intended to secure the individual from the arbitrary exercise of the powers of government.’” Thus, simply a lack of due care on the part of the official (as opposed to an abuse of power) “suggests no more than a failure to measure up to the conduct of a reasonable person” and “[t]o hold that injury caused by such conduct is a deprivation within the meaning of the Fourteenth Amendment would trivialize the centuries-old principle of due process of law.”

Thus, as is clear from the holding in Daniels, state officials’ mere negligent fabrication of evidence by coercing child witnesses would not trigger the protections of the Due Process Clause. This result is consistent with the state’s interest in protecting children from sexual abuse and in not inhibiting officials’ investigations of alleged abuse. The Court in Daniels, however, did not consider whether something

105. Id. at 1063 (Kleinfeld, J., dissenting).
107. See Daniels, 474 U.S. at 330–31 (overruling only the part of the Court’s prior decision in Parratt v. Taylor, 451 U.S. 527 (1981), that held that mere negligence is enough for a deprivation of property).
108. See id.
109. Id. (citations omitted).
110. Id. at 332.
less than intentional conduct, such as recklessness or gross negligence, would be enough to invoke due process protection. In his dissent in Davidson v. Cannon, Justice Brennan wrote, "[O]fficial conduct which causes personal injury due to recklessness or deliberate indifference, does deprive the victim of liberty within the meaning of the Fourteenth Amendment." Such a recklessness standard would be appropriate in child sexual abuse cases like Devereaux because it would sufficiently preserve the state's interest in protecting children from sexual abuse, officials' interest in being able to conduct child interviews free from the inhibiting fear of personal liability, and defendants' interest in not having officials fabricate evidence against them by coercing child witnesses.

2. A Deliberate Indifference Standard

The Supreme Court has employed a deliberate indifference standard in prison-conditions cases and in cases involving the Freedom of Speech and Press Clauses. A comparison of these cases with Devereaux v. Perez demonstrates how and why the deliberate indifference standard applies to Devereaux.

In Farmer v. Brennan, an Eighth Amendment prison-conditions case, the Supreme Court defined the term "deliberate indifference" and the test for it. "[D]eliberate indifference entails something

111. See id. at 334 n.3.
113. For a discussion about the applicability of the "objective reasonableness" test of Anderson v. Creighton, 483 U.S. 635 (1987), described above, to constitutional claims of deliberate indifference, see Rudovsky, supra note 74, at 57 ("Where the constitutional claim requires proof of intentional misconduct or a similarly high level of culpability, the notion of 'objective reasonableness' may be irrelevant. Thus, an eighth or fourteenth amendment claim of 'deliberate indifference' to an inmate's medical needs... should not be subject to an immunity defense. Once the plaintiff proves intentional or deliberately indifferent conduct, the official could not have acted reasonably.").
114. The relationship of the deliberate indifference standard in the context of prison-conditions cases to Devereaux, a due process case, may not be as tenuous as it first appears. Discussing Farmer v. Brennan, 511 U.S. 825 (1994), Sheldon H. Nahmod notes that "[s]ince deliberate indifference or reckless disregard also turns out to be the due process standard in a majority of the circuits, Farmer v. Brennan may be relevant to § 1983 actions based on the due process clause." 1 NAHMOD, supra note 83, at 3-72 n.1.
115. See 511 U.S. at 835-40. According to the Court in Farmer, the term "deliberate indifference" first appeared in the United States Reports in Estelle v. Gamble, 429 U.S. 97 (1976). See Farmer, 511 U.S. at 835. In Estelle, the Court clarified that Eighth Amendment violations involving medical care require deliberate indifference by prison officials to a prisoner's serious illness or injury. See 429 U.S. at 104. Other Eighth Amendment prison cases employing the deliberate indifference standard include: Helling v. McKinney, 509 U.S. 25, 35 (1993) (affirming the circuit court's holding that the plaintiff inmate stated a cause of action under the Eighth Amendment by alleging that the defendants had, "with deliberate
more than mere negligence . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”116 The courts of appeals, as noted in Farmer, usually equate deliberate indifference with recklessness.117 In determining the level of culpability required for deliberate indifference, the Court in Farmer rejected an objective test for deliberate indifference in favor of a subjective test.118 This subjective test is consistent with recklessness in criminal law, which requires that a person disregard a risk of harm about which he has knowledge.119

The Court in Farmer ultimately held:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.120

Thus, to act recklessly or with deliberate indifference in the context of the Eighth Amendment, “a person must ‘consciously disreg[ard]’ a substantial risk of serious harm.”121 However, the Court added that the concept of constructive knowledge could be applicable

indifference, exposed him to levels of ETS that pose[d] an unreasonable risk of serious damage to his future health”); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (holding that the Estelle deliberate indifference standard is applicable to cases alleging inadequate conditions of confinement); La Faut v. Smith, 834 F.2d 389, 391–92 (4th Cir. 1987) (stating that “[w]hether one characterizes the treatment received by [the plaintiff] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the ‘deliberate indifference’ standard articulated in Estelle to this case”).

116. Farmer, 511 U.S. at 835. A standard higher than deliberate indifference is used in one type of prison cases: when officials are accused of using excessive force. See id. at 835–36. In such cases, the prisoner must show that officials used force “maliciously and sadistically for the very purpose of causing harm.” Hudson v. McMillian, 503 U.S. 1, 6 (1992) (internal quotation marks and citations omitted). This heightened standard is applied because in these cases, where prison officials are acting in response to a disturbance, the decisions of the officials are “necessarily made in haste, under pressure, and frequently without the luxury of a second chance.” Whitley v. Albers, 475 U.S. 312, 320 (1986). Thus, in these emergency situations, a higher standard is used to protect the defendants who have necessarily acted quickly and without a lot of time to think about their actions. Comparing these emergency situation cases to Devereaux v. Perez, 218 F.3d 1045 (9th Cir. 2000), demonstrates that it is inappropriate to apply such a heightened intent standard to cases such as Devereaux. Devereaux did not involve an emergency situation like that of the prison cases, in which officials must act in a split second. The defendants in Devereaux, although probably under pressure, had a lot of time (in comparison to prison officials acting in response to a prison disturbance) in which to think about their actions while conducting their investigation of Devereaux.

117. See 511 U.S. at 836.
118. See id. at 837.
119. See id. at 837.
120. Id. at 837.
121. Id. at 839 (citing Model Penal Code § 2.02(2)(c)).
to deliberate indifference so that deliberate indifference "would not, of its own force, preclude a scheme that conclusively presumed awareness from a risk's obviousness." Thus, a fact finder may determine that a prison official knew of a substantial risk based on the fact that the risk was obvious.

This subjective deliberate indifference (or criminal recklessness) standard applicable to prison-conditions cases should be applied to cases such as Devereaux v. Perez. The purpose of this standard, as discussed in Estelle v. Gamble, is to protect prisoners from the infliction of cruel and unusual punishment by officials, who may perhaps be characterized as overzealous. Prisoners do not deserve punishment above and beyond incarceration, such as the denial of needed medical care or the refusal to protect prisoners from violence by other prisoners. Similarly, in Devereaux and other child sexual abuse investigation cases, the person being charged with child abuse needs protection from overzealous officials investigating the allegations of abuse. In both the prison cases and the child abuse investigation cases, the officials taking care of the prisoners or investigating the allegations of abuse may be inclined to "go overboard," and indeed, easily have the opportunities to do so because of their positions of authority, and either inflict more punishment than is deserved, or, in the context of sexual abuse investigations, use highly questionable and unconstitutional means to elicit accusations. In the prison cases, officials may be likely, and have the opportunity, to inflict cruel and unusual punishment because of their positions of power over the prisoners and the perception that the prisoners are in jail because in many instances they have committed horrible wrongs and do not deserve humane treatment. Likewise, in the child abuse cases emotions run very high, and because child abuse is a particularly horrific crime, it is easy for investigating officials to become overzealous in their attempts to protect innocent children. Because

122. Id. at 840.
123. See id. at 842.
124. 218 F.3d 1045 (9th Cir. 2000).
126. See Farmer, 511 U.S. at 832-34; see also Estelle, 429 U.S. at 102-05.
127. In addition, prosecutors can derive several benefits from the aggressive and diligent prosecution of suspected child sexual abuse offenders, regardless of whether the suspects are actually innocent. First, prosecutors may garner positive press in the media, enhancing and advancing their careers and reputations. This incentive may well have played a role in the case brought against Devereaux, as the police detective who led the investigation against Devereaux was newly appointed and the case against Devereaux was his first child sexual molestation case.
of these parallels between Eighth Amendment cases and child abuse investigation cases like Devereaux, it is appropriate to apply the deliberate indifference standard articulated in Farmer v. Brennan to Devereaux in order to protect the accused.

Applying the Farmer subjective deliberate indifference standard to Devereaux demonstrates that the defendants in Devereaux were deliberately indifferent to Devereaux’s right not to be framed, or not to have evidence fabricated against him and used to deprive him of his liberty. Under the deliberate indifference standard, the defendant must have consciously disregarded a substantial risk of serious harm.128 There is sufficient evidence in Devereaux that the defendants consciously disregarded a substantial risk of serious harm to Devereaux by the way in which they conducted the interviews with the foster girls. The defendants threatened, manipulated, and coerced the girls into making false accusations against Devereaux.129 They would not accept the girls’ exculpatory statements, they did not record or inform Devereaux of the exculpatory statements, and they interrogated at least one of the girls for six hours, until she finally implicated Devereaux just so that the defendants would release her.130 Furthermore, the defendants believed incredible accusations that Devereaux and a multitude of others had regularly engaged in group sex orgies with one of the girls and had abused the girl, despite medical evidence that proved that the girl was not sexually active.131

As the dissent noted,

The repeated pattern is that the child says Devereaux did not sexually abuse her or anyone else, and then one or more of the defendants . . . take the child into custody and subject her to extensive interrogation, calling her a liar when she sticks to her exonerating story, and letting her go only when she changes her story to accuse Devereaux. Sometimes the coercion is a threat of prosecution. Sometimes it is long isolation and interrogation late at night. For all the children, subjecting them to the psychological discomfort of hours of sex talk itself could be taken to be coercion, where there was little apparent factual basis for it.132

See Devereaux, 218 F.3d at 1063 (Kleinfeld, J., dissenting). In addition, their zeal in finding and convicting alleged offenders may have the effect of deterring potential child sexual abuse offenders, thus potentially making prosecutors’ jobs easier.

128. See Farmer, 511 U.S. at 839.
129. See 218 F.3d at 1048–50; see also id. at 1057–59 (Kleinfeld, J., dissenting).
130. See id. at 1048–50; see also id. at 1057–59 (Kleinfeld, J., dissenting).
131. See id. at 1050; see also id. at 1057 (Kleinfeld, J., dissenting).
132. Id. at 1058–59 (Kleinfeld, J., dissenting).
In light of this behavior by the defendants, it is clear that the defendants consciously disregarded the risk that by using such outrageous interrogation techniques, Devereaux would be falsely accused of child sexual abuse, arrested, and repeatedly deprived of his liberty. Moreover, the risk of having evidence fabricated against Devereaux and falsely accusing him of sexual abuse was so obvious that a fact finder could very well conclude that the investigating officials knew of the risk and thus violated the deliberate indifference standard.

The US Supreme Court has also employed a subjective approach to recklessness in the context of the Free Speech and Press Clauses. In *Harte-Hanks Communications, Inc. v. Connaughton*, a candidate for a judgeship in Ohio filed a libel action against a local newspaper that had published a story in which false allegations about the candidate were made. The Court discussed the “actual malice” standard applicable to public figure libel cases: the public figure must show by clear and convincing evidence that the defendant published the false and defamatory statement with actual malice. “Actual malice” means the statement was made either with knowledge that it was false or with reckless disregard for the truth. The Court held that the reckless disregard standard in a defamation action is subjective, requiring that “the defendant in fact entertained serious doubts as to the truth of his publication,” or that “the defendant actually had a ‘high degree of awareness of . . . probable falsity.’” Significantly, the Court noted that in a case involving the reporting of a third party’s allegations (as in the case before it), “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”

An examination of the reason why the Court uses a subjective reckless disregard standard in public figure libel actions highlights several parallels between *Harte-Hanks Communications, Inc.* and *Devereaux v. Perez* which show that the reckless disregard standard employed in *Harte-Hanks Communications, Inc.* (and other public

133. See *Farmer*, 511 U.S. at 842.
138. Id. at 688 (quoting *St. Amant*, 390 U.S. at 731).
139. Id. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).
140. Id. (quoting *St. Amant*, 390 U.S. at 732).
figure libel cases) should be applied to *Devereaux* and cases like it.\(^{141}\) Underlying the Court's rule that public figures in libel cases must show the false statement was made with knowledge that it was false or with reckless disregard for its truth is the concern that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective."\(^{142}\) These same concerns are present in cases like *Devereaux*, in which someone is charged with a crime like child sexual abuse. The false accusations against Devereaux, which were procured only through the investigators' use of coercive and very questionable interviewing techniques, are just as valueless as false statements about an individual printed in a newspaper or magazine. In addition, the use of blatantly outrageous interrogation techniques by the investigators in *Devereaux* clearly interfered with the truth-seeking function of the judicial system, just as the publication of the false statements in *Harte-Hanks Communications, Inc.* interfered with the truth-seeking function of the marketplace of ideas. In fact, interference with the judicial system is arguably more serious than interference with the marketplace of ideas, as the primary function of the judicial system is to find the truth and carry out justice.

Injury to reputation is another danger with which both libel cases and child sexual abuse cases are concerned. The false allegations of child abuse against Devereaux manufactured by the defendants are certainly at least as injurious, if not more so, than the false statements about the judicial candidate published in *Harte-Hanks Communications, Inc.* A charge of child sexual abuse is not an allegation that is quickly forgotten and carries with it a serious stigma. For people who have always worked with children and are wrongly accused of child sexual abuse, such an allegation, even though groundless, can plague them for the rest of their lives and could very well prevent them from ever working with children again. Indeed, in its sentencing of Devereaux (after all of the sexual abuse charges against him were dropped), the state court prohibited Devereaux from having contact with some children, from being a foster parent for two years, and

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\(^{141}\) Note that the subjective reckless disregard standard in the context of libel actions applies to nongovernmental conduct, while *Devereaux* and other cases brought under 42 U.S.C. § 1983 deal with conduct by government officials.

from working in an area that provides services to or has regular contact with minor children.\textsuperscript{143}

Furthermore, not only was Devereaux's reputation forever damaged, but also he was wrongly deprived of liberty during his several arrests. This possibility in child sexual abuse cases of the wrongly accused being thrown in jail is not present in the libel cases, and thus suggests that officials like the defendants in \textit{Devereaux}, who manipulate children and fabricate evidence, deserve even less protection than defendants who publish false statements. If a public figure in a libel action only has to satisfy a reckless disregard standard to prevail in his case, a person like Devereaux whose reputation likewise was at stake and whose liberty was actually taken away when he was arrested should not have to satisfy a higher standard than public figures in libel cases.

Moreover, there are several factual similarities between \textit{Harte-Hanks Communications, Inc.} and \textit{Devereaux} which demonstrate that if the Ninth Circuit had applied such a reckless disregard standard in \textit{Devereaux}, the defendants would have clearly been in violation of it. First, \textit{Harte-Hanks Communications, Inc.} is much like \textit{Devereaux} in that the outrageous way in which the defendants interviewed the child witnesses in \textit{Devereaux} effectively led to a kind of defamation of Devereaux. A defendant newspaper printing information when it has serious doubts about the truth of that information is parallel to the defendants in \textit{Devereaux} using the false accusations they coerced from the foster girls against Devereaux to charge him with child sexual abuse. In both situations, the defendant is using information, the truth and accuracy of which is highly questionable, to harm another person.

There are several more specific factual similarities between the two cases. In \textit{Harte-Hanks Communications, Inc.}, the judicial candidate himself and five other witnesses had denied the false charges against the candidate before the defamatory story was published.\textsuperscript{144} Furthermore, as the Court noted, the most serious charge against the judgeship candidate was "highly improbable" and "inconsistent" with facts known by the newspaper before it published the story.\textsuperscript{145} The newspaper also failed to listen to tapes that the judgeship candidate made available to it (before the publication of

\textsuperscript{143} \textit{See} Devereaux v. Perez, 218 F.3d 1045, 1050 (9th Cir. 2000).
\textsuperscript{144} \textit{See} 491 U.S. at 691.
\textsuperscript{145} \textit{Id.}
the defamatory story) that would have discredited the accusations against the candidate published in the story.\textsuperscript{146} Characterizing the defendant newspaper's actions (and inaction) as "a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the charges against the candidate]" and as "the purposeful avoidance of the truth," the Court concluded that the plaintiff satisfied the actual malice standard.\textsuperscript{147}

The defendants' actions in \textit{Devereaux} closely resemble the defendant's actions in \textit{Harte-Hanks Communications, Inc.} Devereaux himself denied the child abuse allegations against him and almost all, if not all, of the foster girls in his care at least at some point in their interviews denied that Devereaux had engaged in any abuse.\textsuperscript{148} Also, like one of the charges against the candidate in \textit{Harte-Hanks Communications, Inc.}, several of the allegations against Devereaux were highly improbable\textsuperscript{149} and inconsistent with other facts.\textsuperscript{150} Similar to the defendant newspaper's failure to listen to the exculpatory tapes before printing the story in \textit{Harte-Hanks Communications, Inc.}, the defendants in \textit{Devereaux} refused to accept the exculpatory statements that the foster girls made and in fact failed to record, and even concealed, these statements.\textsuperscript{151} These actions by the defendants in \textit{Devereaux}, like those of the newspaper in \textit{Harte-Hanks Communications, Inc.}, can be characterized as "the purposeful avoidance of the truth."

Application of the reckless disregard standard articulated in \textit{Harte-Hanks Communications, Inc.} to \textit{Devereaux} warrants the conclusion that the defendants in \textit{Devereaux} reckless disregard
the truth of their accusations against Devereaux. The defendants in
Devereaux threatened and manipulated the foster girls into accusing
Devereaux of sexual abuse. These outrageous techniques that the
defendants used when interviewing the children are ample evidence
that the defendants charged Devereaux with sexual molestation and
arrested him with a high degree of awareness that the charges against
him were false. Thus, the defendants violated the reckless disregard
standard set forth in Harte-Hanks Communications, Inc.153

B. Framing the Right at Issue

The majority's second error in Devereaux v. Perez is the way in
which it framed the right at issue in the case. The court defined the
right too specifically, and thus incorrectly concluded that the defen-
dants did not violate a constitutional right.

1. The Level of Generality or Specificity at Which the Right Should
Have Been Defined

The court framed the right involved in the case as the "right to
have child witnesses, in a child sexual abuse investigation, interviewed
in a particular manner or pursuant to a certain protocol."154 By
describing the right at issue as a right to have children interviewed in

152. See id. at 1048-50; see also id. at 1057-59 (Kleinfeld, J., dissenting).
153. Additional support for applying a deliberate indifference standard in child abuse
investigation cases like Devereaux comes from the Supreme Court's holding in Franks v.
Delaware, 438 U.S. 154 (1978). In Franks, the Court found a reckless disregard standard
applicable to statements made by police officers in support of a search warrant. See id. at 155-56.
It held that when a defendant in a criminal proceeding shows that a government official
"knowingly and intentionally, or with reckless disregard for the truth" made a false statement
which was necessary to the finding of probable cause and then included that false statement in a
warrant affidavit, the search warrant must be voided. See id. (emphasis added). The Court in
Franks did not specifically address the use of a reckless disregard standard in the probable cause
context. However, the fact that in order to establish a violation of the right not to be arrested or
prosecuted without probable cause a defendant only has to show that the officer procuring the
warrant affidavit made a false statement with reckless disregard for the truth, see Soares v.
Connecticut, 8 F.3d 917, 920 (2d Cir. 1993), supports the argument that a deliberate indifference
(or reckless disregard) standard should be applied to child abuse investigation cases. The
probable cause cases in which defendants have successfully challenged the veracity of the sworn
statements in warrant affidavits are similar to Devereaux. In the probable cause cases, the
officers have used false statements to procure search warrants, and in Devereaux, the officials
used false statements to charge Devereaux with child sexual abuse and deprive him of his
liberty. In the probable cause cases and in Devereaux, the government officers used false
statements to deprive victims of their constitutional rights—in the probable cause cases, the
actions of the officers deprived victims of their Fourth Amendment rights, while in Devereaux,
the defendants' actions deprived Devereaux of his Fourteenth Amendment right not to have his
liberty taken away without due process of law.
154. Devereaux, 218 F.3d at 1053.
a particular manner, the court framed Devereaux's violated right much too narrowly.\textsuperscript{155}

The US Supreme Court, in \textit{Anderson v. Creighton}, addressed the question of how generally or specifically a constitutional right should be defined.\textsuperscript{156} In considering whether an FBI agent who participated in an illegal search may be held liable if a reasonable agent could have believed that the search was legal, the Court stated that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action... assessed in light of the legal rules that were 'clearly established' at the time it was taken."\textsuperscript{157}

The operation of this "clearly established law" test depends, according to the Court, to a great extent on "the level of generality at which the relevant 'legal rule' is to be identified."\textsuperscript{158} For instance, if the relevant constitutional right is defined as the right to due process of law, the notion of qualified immunity would become meaningless because every state official is reasonably aware that such a broad right exists.\textsuperscript{159} The constitutional right in such a case is defined much too generally, and "bear[s] no relationship to the 'objective legal reasonableness' that is the touchstone of \textit{Harlow}."\textsuperscript{160} Thus, the

\textsuperscript{155} Because it framed the right so specifically, the court was probably correct when it concluded that there is no established due process right to have child witnesses in a child sexual abuse case interviewed in a certain manner. \textit{See id.} at 1053. Indeed, the court cited several federal circuit court decisions all rejecting the proposition that improper interviewing of child witnesses in sexual abuse cases may constitute a Fourteenth Amendment due process violation or, more specifically, a violation of a right to family integrity. \textit{See id.} at 1053–54. However, in \textit{State v. Michaels}, 642 A.2d 1372 (1994), the supreme court of New Jersey suggested that due process concerns may be implicated by an improper investigation of child witnesses in a child sexual abuse case. \textit{See id.} at 1380. After concluding that the interviews of children in that case were "highly improper and employed coercive and unduly suggestive methods," the court recognized the due process rights of the defendant:

\begin{quote}
This Court has a responsibility to ensure that evidence admitted at trial is sufficiently reliable so that it may be of use to the finder of fact who will draw the ultimate conclusions of guilt or innocence. That concern implicates principles of constitutional due process.... If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk.
\end{quote}

\textit{Id.} (citation omitted). For an analysis of the \textit{Michaels} case and an argument that constitutional due process protections should be applied to the way in which child interviews are conducted, see Dugas, \textit{supra} note 22.

\textsuperscript{156} 483 U.S. 635, 639–40 (1987).

\textsuperscript{157} \textit{Id.} at 639 (citations omitted).

\textsuperscript{158} \textit{Id.}

\textsuperscript{159} \textit{See id.}

\textsuperscript{160} \textit{Id.} (referring to \textit{Harlow v. Fitzgerald}, 457 U.S. 800 (1982)).
constitutional right allegedly violated must be defined more specifically:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.¹⁶¹

The Court in Anderson was careful to emphasize that this framing of the underlying constitutional right does not involve examination of the official's subjective intent: "The relevant question in this case... is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the defendant's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed."¹⁶²

In deciding whether the contours of the right have been defined at an appropriate level of specificity, courts usually examine prior case law.¹⁶³ However, it is not necessary that the court find a prior case with the very same facts as the case before it to hold that the official violated a clearly established right.¹⁶⁴ To the contrary, qualified immunity does not protect state actors when preexisting law provided the official with "'fair warning' that his conduct was unlawful."¹⁶⁵ In other words, for a right to be clearly established, "the law must have defined the right in a quite specific manner, and... the announcement of the rule establishing the right must have been unambiguous and widespread, such that the unlawfulness of particular conduct will be apparent ex ante to reasonable public officials."¹⁶⁶

In light of the Supreme Court's discussion in Anderson of the level of generality or specificity at which a constitutional right should be defined, it is clear that the majority in Devereaux framed the right at issue in the case too specifically.¹⁶⁷ The Supreme Court stated in Anderson that the very action in question does not have to have

¹⁶¹. Id. at 640 (citations omitted).
¹⁶². Id. at 641.
¹⁶³. Schwenk v. Hartford, 204 F.3d 1187, 1197 (9th Cir. 2000).
¹⁶⁴. Id. (citations omitted).
¹⁶⁵. Id. (citing United States v. Lanier, 520 U.S. 259, 270–71 (1997)).
¹⁶⁷. Another way to state this criticism is to say, as did the dissent, that the majority made an excessive demand for specificity by requiring that there be prior case law which spells out the proper way for social workers and other public officers to interview children in sexual abuse cases. See Devereaux v. Perez, 218 F.3d 1045, 1059–60 (9th Cir. 2000) (Kleinfeld, J., dissenting).
previously been held unlawful in order for there to be a violation of a clearly established constitutional right. However, by framing the right in question as the right to have children interviewed in a particular manner in sexual abuse cases, the majority was effectively saying that the way in which the officials interviewed Devereaux's foster children must have previously been held to be a constitutional violation in order for the court to find that the officials in Devereaux violated a constitutional right. As the dissent stated, the majority's propositions, on which it bases its decision, that there are no cases holding that there is a constitutional right to have child witnesses interviewed in a certain way and no established standards for interviewing child witnesses, "beg the question of whether a constitutional right has been clearly established by the case law, and phrase[] the test in positive terms that ensure that the test of specificity will never be satisfied."

The dissent used a helpful example to illustrate the fact that the majority framed the right too narrowly. The dissent cited a hypothetical case (which was originally articulated in a Sixth Circuit Court of Appeals dissent and subsequently cited by the Supreme Court in United States v. Lanier involving the sale of foster children into slavery by welfare officials). If such a case arose, the welfare workers could argue that there is no case prohibiting welfare officials from selling foster children into slavery. However, it is clear that in such a situation the absence of any case law regarding the selling of children into slavery would not justify the imposition of qualified immunity.

168. See 483 U.S. 635, 640 (1987). See also the dissent in Devereaux, 218 F.3d at 1059–60, which stated that qualified immunity "does not grant government officials immunity if they engage in action that a sensible person would realize was unconstitutional, even though there is no case on all fours that holds the conduct to be unconstitutional," and "[i]t is clearly established that absence of a case in point does not necessarily entitle social workers to qualified immunity."

169. Interestingly, the majority cited the statement in Anderson that the very action in question does not have to have been previously held unlawful in order for the constitutional right to be established. See Devereaux, 218 F.3d at 1052–53.

170. Id. at 1060 (Kleinfeld, J., dissenting).


172. See Devereaux, 218 F.3d at 1060 (Kleinfeld, J., dissenting).

173. See id. at 1060–61 (Kleinfeld, J., dissenting).

174. See id. at 1061 (Kleinfeld, J., dissenting); see also McDonald v. Haskins, 966 F.2d 292, 295 (7th Cir. 1992) ("It would create perverse incentives indeed if a qualified immunity defense could succeed against those types of claims that have not previously arisen because the behavior alleged is so egregious that no like case is on the books.").
As in the hypothetical case just discussed, the defendant social workers in *Devereaux* apparently argued (and the court accepted this argument) that because there is no case prohibiting officials from interviewing children in the way in which Devereaux's foster children were interviewed, Devereaux had not established the violation of any constitutional right. In arguing this, however, "the social workers demand more specificity than they are entitled to." The court unfortunately agreed with the defendants' argument and demanded too much specificity, as is apparent by the overly narrow way in which it defined the constitutional right at issue.

By demanding excessive specificity, the court basically eliminated the possibility of any state official ever being held liable for a violation of a defendant's due process right because of the way in which the official conducted child interviews, regardless of the outrageousness of the official's interviewing techniques, until there is case law providing instructions on how children are to be interviewed in sexual abuse cases. Indeed, one could even go so far as to argue that the majority eliminated the possibility of a state official ever being held liable in such a situation because, as the dissent noted, there will probably never be a case telling officials how to interrogate children in sexual abuse cases as "judicial decisions ordinarily do not write methodology guides for various kinds of public officials."

Furthermore, "[w]hat should be uppermost" in the "clearly settled law" inquiry after *Anderson v. Creighton* is "one of the purposes of the qualified immunity defense: fairness to potential defendants who should not have to predict constitutional law developments." This concern with fairness to defendants, however, is not an issue in *Devereaux*, since the defendants did not have to predict any constitutional law developments to realize that coercing the foster girls into making false accusations against Devereaux and then using those

175. 218 F.3d at 1061 (Kleinfeld, J., dissenting).
176. Rather ironically, the majority asserted that Devereaux's claimed right to have children interviewed in such a way as to avoid leading questions or influencing the children was "such a generalized legal right as to 'convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging [a] violation of extremely abstract rights.'" *Id.* at 1054 (citation omitted) (emphasis added). The majority further stated that "'[t]he evidence relied upon by Devereaux is so general and unavailing that it would create a nebulous, unconstrained abstract constitutional right.'" *Id.* The majority perhaps mistakenly relied on its finding that Devereaux's evidence is too general and vague in deciding that the right at issue was too generalized and hence not clearly established.
177. *Id.* at 1060 (Kleinfeld, J., dissenting).
178. 2 NAHMOD, *supra* note 83, at 8-57.
fabricated statements to charge Devereaux with sexual abuse is unconstitutional. Despite the fact that, as the majority noted, "[t]he constitutional dimensions of investigatory techniques employed to discover child sexual abuse are simply not clearly established," any reasonable official investigating child abuse would know that coercing child witnesses to lie violates the suspect's right not to be framed and not to have evidence fabricated against him and used to deprive him of his liberty. The defendants in Devereaux had "fair warning" that their conduct was unlawful, and therefore qualified immunity should not have shielded them from Devereaux's claim.

2. Ways to Frame the Right at Issue

The majority could have and should have framed the constitutional right in question in Devereaux in broader terms. As the dissent argued, the majority should have defined the right allegedly violated as a defendant's right not to have false charges fabricated against him, or the "right not to be 'framed.'" This right can also be stated as Devereaux's constitutional right not to be deprived of liberty (Devereaux was in jail for substantial periods on false charges of raping children) without due process of law, or his right not to have evidence fabricated and used to initiate proceedings against him.

As the dissent noted, Devereaux provided evidence that the defendants coerced the foster girls into accusing Devereaux of sexual abuse, and from this evidence, it can be inferred that the defendants knew they were obtaining false evidence against Devereaux. Indeed, the techniques the defendants used to force the children into

179. *Devereaux*, 218 F.3d at 1056.
180. *See id.* at 1061–62 (Kleinfeld, J., dissenting).
181. *Id.* at 1057, 1061–62 (Kleinfeld, J., dissenting).
182. *See id.* at 1061–62 (Kleinfeld, J., dissenting) ("It is established law that when a government official coerces a witness to provide what the government official knows is false evidence against a person, to be used in a criminal prosecution, the official violates the due process rights of the person against whom the false evidence is to be used."); *see also* Pyle v. Kansas, 317 U.S. 213, 216 (1942) (holding that "perjured testimony, knowingly used by the State authorities to obtain [petitioner's] conviction" and "deliberate suppression by those same authorities of evidence favorable to [petitioner]" violated the Constitution); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997) (stating that "[l]ike a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication . . . of known false evidence works an unacceptable 'corruption of the truth-seeking function of the trial process.' When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983." (citations omitted)).
183. *See Devereaux*, 218 F.3d at 1060–61 (Kleinfeld, J., dissenting).
making the accusations against Devereaux were so suggestive and manipulative that it is very difficult not to make the inference that the defendants knew exactly what they were doing, namely, coercing children to lie in order to support sexual abuse allegations against Devereaux.184

The court in Devereaux could have also framed the right at issue, as did the Second Circuit in a case very similar to Devereaux, as "the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity."185 In Zahrey v. Coffey, the Second Circuit held that there is a clearly established right not to be deprived of liberty as a result of the fabrication of evidence by a government official.186 The plaintiff in Zahrey brought suit against several police officers and prosecutors for conspiring to manufacture false evidence to be used against the plaintiff in criminal and police disciplinary proceedings.187 The defendants allegedly influenced and bribed witnesses to fabricate false accusations and ultimately testify against the plaintiff.188 For example, the defendants promised a federal grand jury witness, in order to get her to testify against the plaintiff, that they would assist her in finishing a drug rehabilitation program, help her obtain custody of her children, and provide financial assistance to enable her to move to a new residence.189 After this witness testified against the plaintiff, the defendants procured the witness's early release from the drug rehabilitation program and assisted her in moving to a new residence.190 A grand jury indicted the plaintiff on several charges and the plaintiff was arrested.191 Almost a year later, a jury acquitted the plaintiff of all the charges.192 Upholding the plaintiff's claims against the defendants, the Second Circuit noted that the plaintiff had alleged a "classic constitutional violation: the deprivation of his liberty

184. For example, one of the foster children was threatened with the filing of charges for false reporting when she claimed that Devereaux had not raped her, in contradiction to her earlier statement that he had. See id. at 1048. Another foster girl repeatedly denied that Devereaux had sexually abused her until finally, at 11:00 P.M., after six hours of interrogation, she stated that Devereaux had sexually abused her. See id. at 1048–49. She later said that she had made this allegation only because she was "sick and tired" of being questioned. Id.
186. Id. at 344.
187. Id.
188. Id. at 345–46.
189. Id. at 345.
190. Id.
191. Id. at 346.
192. Id.
without due process of law.[] The liberty deprivation is the eight months he was confined . . . and the due process violation is the manufacture of false evidence.”

The court in Devereaux could have and should have framed the right at issue in the case, as did the Second Circuit in Zahrey, as the right not to be deprived of liberty as a result of the fabrication of evidence by a government official. The defendants in Devereaux, like the defendants in Zahrey, wrongly influenced witnesses to concoct false accusations against Devereaux, and then used these fabricated allegations to arrest Devereaux. Devereaux, like the plaintiff in Zahrey, was deprived of his liberty as he was held in jail based on the defendants’ fabricated evidence. Thus, there was also a “classic constitutional violation” by the defendants in Devereaux: they deprived Devereaux of his liberty without due process of law. The deprivation of liberty is the time that Devereaux was confined in jail and the due process violation is the manufacture of false evidence against him.

The right not to be deprived of liberty because of the fabrication of evidence by a government official, or a right not to be framed, as the Devereaux dissent described it, may also alternatively be stated as a defendant’s right not to have “dubiously” gathered evidence (or evidence that has been gathered under circumstances which make its reliability questionable) used against him in a criminal prosecution. Two cases lend great support to the existence of such a due process right, although they do not frame the right in such exact words.

Idaho v. Wright, a case involving child sexual abuse, offers some support. The Supreme Court in this case affirmed the Idaho Supreme Court’s decision that the admission at a mother’s trial of statements her daughter, the alleged victim, made to a pediatrician violated the mother’s rights under the Confrontation Clause.

The Court noted that the Idaho Supreme Court had concluded that the pediatrician’s failure to videotape interviews with the

193. Id. at 348.
194. See Devereaux v. Perez, 218 F.3d 1045, 1048–50 (9th Cir. 2000). Although the defendants in Devereaux did not bribe the witnesses, as did the defendants in Zahrey, the defendants in Devereaux used similar techniques to influence the children and coerce them into making false accusations against Devereaux, such as threatening them and refusing to accept their exculpatory statements. See id.
195. See id. at 1049.
197. Id. at 812–13.
daughter, the use of blatantly leading questions, the presence of an interviewer with a preconceived idea of what the daughter should have been saying, and children's general vulnerability to suggestive questioning all indicated the potential for the procurement of unreliable information. The Court agreed with the state supreme court's determination that the daughter's statements were not reliable because of the suggestive way in which the pediatrician conducted the interviews with the daughter. Although the hearsay rule was a major factor in this case, the dubious or unreliable nature of the evidence gathered from the child witness played a role in the Court's decision that evidence of the child's statements could not be admitted.

*State v. Michaels*, another child sexual abuse case, also expressed concern about the use of dubiously gathered evidence. In fact, the New Jersey Supreme Court was so concerned about the use of dubiously gathered evidence in this case that it decided that a hearing was required to determine whether the improper interrogation of child witnesses “so infected the ability of the children to recall the alleged abusive events that their pretrial statements and in-court testimony based on that recollection are unreliable and should not be admitted into evidence.” The court stated that there was adequate agreement within the academic, professional, and law enforcement fields, which has been supported by some courts, “to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.” The court's requirement that a “taint hearing” be held before the unreliably gathered information be admitted into evidence prevents any use of such evidence if it is found to be

198. Id.
199. Id. at 813, 826–27.
201. Id. at 1380. Such hearings are called “taint hearings.” See John E.B. Myers, *A Decade of International Legal Reform Regarding Child Abuse Investigation and Litigation: Steps Toward a Child Witness Code*, 28 PAC. L.J. 169, 175 (1996). Note that the question in *State v. Michaels*, namely, whether a taint hearing was required, was a question of state, not federal, law. In support of its decision that a hearing was required, however, the court cited several US Supreme Court decisions. See Michaels, 642 A.2d at 1378–82.
202. Michaels, 642 A.2d at 1379; see also CAMPBELL, *supra* note 19, at 84, which concludes, “the research examining the effects of suggestibility on children's memory dramatically demonstrates: (1) it is quite easy to distort a child’s memory via leading and suggestive questions and (2) once the child’s memory is distorted, the child genuinely believes the distortion.”
“tainted” and thus encourages the notion of a defendant’s right not to have evidence that has been dubiously collected used to prosecute him.

Both Wright and Michaels implicitly, if not explicitly, recognized a defendant’s interest in not having dubiously gathered evidence used against him and therefore lend support to the existence of such a right. The majority in Devereaux avoided this issue of unreliably gathered evidence by hiding behind its conclusion that the standards for interviewing child witnesses are not established clearly enough to allow it to find that the way in which the defendants interviewed the children was improper or that the evidence they obtained was unreliable. The majority’s failure to condemn, or even address the possibility of the use of dubiously collected evidence in the case against Devereaux leaves the door open for the continued use of outrageous and unconstitutional child interviewing techniques by state officials.

The treatment of confessions made under hypnosis and, more generally, coerced confessions lends further support to a defendant’s right not to have dubiously gathered evidence used against him in criminal proceedings. One case that expressed concern about the use of dubiously gathered evidence in the context of confessions made under hypnosis is Burns v. Reed. In this case, the plaintiff brought a suit under 42 U.S.C. § 1983 against a deputy prosecuting attorney who authorized, as part of the investigation of the shooting of the plaintiff’s two sons, the interrogation of the plaintiff while she was under hypnosis. While under hypnosis, the plaintiff made statements that led the police officers conducting the questioning to believe that the plaintiff might have shot her sons. The defendant prosecutor later told police officers that they had probable cause to arrest the plaintiff based on the results of the hypnosis session. After the trial court granted the plaintiff’s motion to quash the statements she made under hypnosis, the prosecutor dismissed all of the charges against the plaintiff.

203. See 218 F.3d 1045, 1056 (9th Cir. 2000).
204. 44 F.3d 524 (7th Cir. 1995).
205. Id. at 525–26.
206. Id. at 526.
207. Id. at 525–26.
208. Id. at 526.
Although the Seventh Circuit in *Burns* ultimately determined that the defendant prosecutor was entitled to qualified immunity because the right to be free from coercive interrogation in the form of hypnosis was not clearly established at the time of the events in question, the court suggested that there may be a right not to have a confession extracted by means of hypnosis. The court stated, “The plaintiff in [the] case was allegedly subjected while in a vulnerable and highly suggestible hypnotic state to bullying and intimidation from the investigative officers, approved (and later concealed) by the defendant. This is a disturbing scenario that conceivably could skirt the edges of constitutional propriety.” Confessions and statements obtained under hypnosis certainly qualify as dubiously gathered evidence, as the *Burns* court noted:

Hypnosis admittedly suffers from some unique defects—its known effects include increased suggestibility, a tendency to “confabulate” or fill in gaps with fictitious details, an inability to sift fantasy from fact and an unwarranted boost in the subject’s confidence in what he is relating. . . . Furthermore, subjects of hypnosis report an “experience of responding involuntarily.”

Thus, the existence, or even the mere suggestion of the existence, of a right not to have confessions extracted under hypnosis (and the *Burns* trial court’s quashing of the plaintiff’s statements made under hypnosis) illustrates the courts’ concern with the use of such dubiously gathered evidence.

In support of her contention that hypnosis violated her constitutional rights, the plaintiff in *Burns* presented case law establishing that extracting coerced confessions is a constitutional violation. The Supreme Court’s characterization and treatment of coerced confessions demonstrates its unease with dubiously gathered evidence. It is well settled that obtaining a confession by either mental or physical coercion constitutes a constitutional violation and that coerced confessions cannot be admitted as evidence in criminal

209. See id. at 527, 529.
210. See id. at 527.
211. Id. (citations omitted); see also Rock v. Arkansas, 483 U.S. 44, 59–60 (1987) (“Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes ‘suggestible’ and may try to please the hypnotist with answers the subject thinks will be met with approval; the subject is likely to ‘confabulate,’ that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences ‘memory hardening,’ which gives him great confidence in both true and false memories, making effective cross-examination more difficult.”); William G. Traynor, Comment, *The Admissibility of Hypnotically Induced Testimony*, 55 Tenn. L. Rev. 785 (1988).
212. See 44 F.3d 524, 527 (7th Cir. 1995).
For example, in *Chambers v. Florida*, the Court determined that government officials coerced the defendants to confess to committing a crime by, among other acts, repeatedly questioning the defendants over several days, by intimidating and pressuring the defendants, and by not allowing the defendants to talk with counsel or any friends or relatives. Because the confessions were coerced, the Court held that the use of the confessions at trial violated the defendants' due process rights.

Whether the right at issue in *Devereaux* is framed as the right not to be framed, the right not to be deprived of liberty because of the fabrication of evidence by a government official, or the right not to have dubiously gathered evidence used to deprive one of liberty, it is clear that the defendants violated Devereaux's right and that the majority erred in framing the right as narrowly as it did.

213. *See* Leyra v. Denno, 347 U.S. 556, 558 (1954); *see also* Townsend v. Sain, 372 U.S. 293, 307 (1963) ("If an individual's 'will was overborne'[] or if his confession was not 'the product of a rational intellect and a free will,' his confession is inadmissible because coerced. These standards are applicable whether a confession is the product of physical intimidation or psychological pressure and, of course, are equally applicable to a drug-induced statement."); Brown v. Mississippi, 297 U.S. 278, 284-86 (1936) (holding that the infliction of physical violence in order to obtain confessions and the use of the coerced confessions to convict the defendants was a denial of due process).

214. *See* 309 U.S. 227, 230-35, 238-40 (1940). The techniques that the government officials in *Chambers* used to elicit the confessions are very similar to those used by the defendants in *Devereaux* (although in *Devereaux*, the officials were eliciting accusations instead of confessions). When first interrogated, the foster children in *Devereaux* all repeatedly denied that Devereaux had abused them. 218 F.3d 1045, 1048-50 (9th Cir. 2000). Likewise, in *Chambers*, over the course of several days all of the suspects consistently denied guilt. *See* 309 U.S. at 230-35. Because of their failure to procure any accusations or confessions, the officials in both cases repeatedly questioned the interviewees and threatened and intimidated them. *Id.* at 230-32; *Devereaux*, 218 F.3d at 1048-50. In an attempt by the officials to get the interviewees to break down, the suspects in *Chambers* were questioned late at night, 309 U.S. at 231-32, as was at least one of the girls in *Devereaux*, 218 F.3d at 1049.

215. *See* Chambers, 309 U.S. at 239-42.

216. In a case very similar to *Devereaux*, the US District Court for the Northern District of Texas focused on the right to family integrity and framed the right at issue as a parent's "right to be free from false allegations of child sexual molestation knowingly made by state investigators in an effort to remove or retain a child from the parents." Tiemeyer v. Zaika, 947 F. Supp. 1012, 1014 (N.D. Tex. 1996). In *Tiemeyer*, the plaintiff-father brought a suit under section 1983 claiming that state investigators fabricated and manufactured evidence that the plaintiff had sexually molested his son to support a court-ordered separation of the plaintiff and his son. *Id.* at 1012. Following Fifth Circuit precedent holding that the contours of a parent's substantive due process liberty interest in the care and custody of his children are not sufficiently defined to consider the right clearly established, the district court reluctantly dismissed Tiemeyer's claim with prejudice. *Id.* at 1013-14. Noting that the Fifth Circuit had declined to expressly declare such a parental right, the court found it "necessary" to articulate a parent's right to be free from false allegations of child sexual molestation made by state investigators. *Id.* at 1014. The court's reasoning for articulating such a right was that to continue to deny the claims of parents on the ground that their interest [in family integrity and harmony] is perennially "nebulous" is to deny them their interest
CONCLUSION

The Ninth Circuit’s decision in *Devereaux v. Perez* has two major flaws that have serious implications. By requiring too high an intent standard and by failing to find the violation of a constitutional right because it defined the due process right at issue in the case too specifically, the court in *Devereaux* encourages the use of dubiously gathered evidence to prosecute suspected child sexual abuse offenders. The court’s refusal to protect Devereaux’s right not to have fabricated evidence used against him to deprive him of his liberty unfortunately has provided a green light to overzealous child abuse investigators, like the defendants in *Devereaux*, to use whatever child interviewing techniques, no matter how outrageous, in order to concoct cases against wrongly accused people like Devereaux.


The terrible things that occurred [between 1692 and 1693] should serve as a warning to people everywhere. This book shows how easy it is to come to the wrong conclusions when the whole truth of a matter is neither sought nor wanted. Our judicial system, though not perfect, has come a long way since this tragedy, and one can’t help but feel that this black time in American history played a significant role in its development.217

Just like the Salem witchcraft hysteria of 1692 and 1693, Robert Devereaux’s story three centuries later shows “how easy it is to come to the wrong conclusions when the whole truth of a matter is neither sought nor wanted.”218 The outrageous way in which the investigators in *Devereaux* interviewed the foster girls and conducted themselves during the investigation demonstrates that these officials neither sought nor wanted the whole truth about Robert Devereaux.

altogether and affords state actors with *de facto* absolute immunity. Both results are contrary to the law. Parents do enjoy a liberty interest in the integrity and harmony of their families. . . . Moreover, state investigators do not enjoy absolute immunity for their conduct in making decisions regarding child welfare of the type at issue here. . . . Part of the reluctance of other courts [to articulate such a parental right] may stem from the proposition that the interest of the parents must be weighed against the interest of the state in child safety and welfare. . . . However, it is a small step in drawing the contours of the interests of the parents to rule that the interest includes freedom from false accusations of child molestation knowingly made by state officials. . . . Also, the state’s interest in child safety and welfare is not served when an official knowingly and falsely charges a parent with sexual abuse.

*Id.* (citations omitted).

217. YOOL, supra note 1, at Preface.

218. *Id.*
unfortunate stories of Robert Devereaux and others falsely accused of child sexual abuse, which are frighteningly similar to the accounts of the Salem witchcraft hysteria, make one wonder whether the American judicial system has come such a long way after all since the tragedy of the Salem witchcraft trials.