SUPREME COURT OF THE UNITED STATES

No. 91–7849

STEPHEN BUCKLEY, PETITIONER *v.* MICHAEL FITZSIMMONS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June 24, 1993]

JUSTICE STEVENS delivered the opinion of the Court.

In an action brought under 42 U. S. C. §1983, petitioner seeks damages from respondent prosecutors for allegedly fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment. The questions presented are whether respondents are absolutely immune from liability on either or both of these claims.

As the case comes to us, we have no occasion to consi-der whether some or all of respondents' conduct may be protected by qualified immunity. Moreover, we make two important assumptions about the case: first, that petitioner's allegations are entirely true; and, second, that they allege constitutional violations for which §1983 provides a remedy. Our statement of facts is therefore derived en- tirely from petitioner's complaint and is limited to matters relevant to respondents' claim to absolute immunity.

Petitioner commenced this action on March 4, 1988, following his release from jail in DuPage County, Illinois. He had been incarcerated there for three years on charges growing out of the highly publicized murder of Jeanine Nicarico, an 11-year-old child, on February 25, 1983. The complaint named 17

defendants, including DuPage County, its Sheriff and seven of his assistants, two expert wit-nesses and the estate of a third, and the five respondents.

Respondent Fitzsimmons was the duly elected DuPage County State's Attorney from the time of the Nicarico murder through December 1984, when he was succeeded by respondent Ryan, who had defeated him in a Republican primary election on March 21, 1984. Respondent Knight was an assistant state's attorney under Fitzsimmons and served as a special prosecutor in the Nicarico case under Ryan. Respondents Kilander (who came into office with Ryan) and King were assistant prosecutors, also assigned to the case.

The theory of petitioner's case is that in order to obtain an indictment in a case that had engendered "extensive publicity" and "intense emotions in the community," the prosecutors fabricated false evidence, and that in order to gain votes, Fitzsimmons made false statements about petitioner in a press conference announcing his arrest and indictment 12 days before the primary election. Petitioner claims that respondents' misconduct created a "highly prejudicial and inflamed atmosphere" that seriously impaired the fairness of the judicial proceedings against an innocent man and caused him to suffer a serious loss of freedom, mental anguish, and humiliation.

The fabricated evidence related to a bootprint on the door of the Nicarico home apparently left by the killer when he kicked in the door. After three separate studies by experts from the DuPage County Crime Lab, the Illinois Department of Law Enforcement, and the Kansas Bureau of Identification, all of whom were unable to make a reliable connection between the print and a pair of boots that petitioner had voluntarily supplied, respondents obtained a "positive identification" from one Louise Robbins, an anthropologist in North Carolina who was allegedly well known for her willingness to fabricate unreliable expert testimony. Her opinion was

obtained during the early stages of the investigation, which was being conducted under the joint supervision and direction of the sheriff and respondent Fitzsimmons, whose police officers and assistant prosecutors were performing essentially the same investigatory functions.[1]

Thereafter, having failed to obtain sufficient evidence to support petitioner's (or anyone else's)

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[1]The relevant period and prosecutorial functions are described in petitioner's first amended complaint:

"28) Defendant Knight, and various others [sic] Defendants, including Doria, Fitzsimmons, and Burandt, apparently not satisfied with Defendant German's conclusions, contacted anthropologist Louise Robbins and Defendant Olsen of the Kansas Bureau of Identification [sic] Crime Lab in search of a positive boot identification.

. . . . .

"31) Confronted with three different expert reports which failed to match Plaintiff's boot with the footprint on the door, the Defendants, including Knight, Burandt, and German, procured their `positive identification' from Louise Robbins, whose theories and reputation in the forensic community were generally discredited and viewed with great skepticism, a fact these Defendants knew or should have known.

"32) Defendants Knight and King were involved with the Sheriff's police in all the early stages of their investigation, including the interrogation of witnesses and potential suspects. Specifically, Sheriff's detectives, including defendants Wilkosz and Kurzawa, at the direction and under the supervision, and sometimes in the presence and with the assistance of Defendants Knight, King, Soucek and Lepic, repeatedly interrogated alleged suspects, including Plaintiff Buckley and Alex Hernandez, who were not

arrest, respondents convened a special grand jury for the sole purpose of investigating the Nicarico case. After an 8-month investigation, during which the grand jury heard the testimony of over 100 witnesses, including the bootprint experts, it was still unable to return an indictment. On January 27, 1984, respondent Fitzsimmons admitted in a public statement that there was insufficient evidence to indict anyone for the rape and murder of Jeanine Nicarico. Although no additional evidence was obtained in the interim, the indictment was returned in March, when Fitzsimmons held the defamatory press conference so shortly before the primary election. Petitioner was then arrested, and because he was unable to meet the bond (set at $3 million), he was held in jail.

Petitioner's trial began 10 months later, in January

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represented by counsel. Despite intense pressure and intimidation, Plaintiff Buckley steadfastly maintained his innocence and demonstrated no knowledge of the crime, while Hernandez told such wild and palpably false stories that his mental instability was obvious to the Defendants.

"33) As a result of these interrogations, at least one experienced Sheriff's detective who participated[,] concluded that Buckley and Hernandez were not involved in the Nicarico crime. This conclusion was buttressed by his general knowledge of the bootprint `evidence.'

"34) He repeatedly communicated his conclusion and its basis, to the Defendants named herein, including Defendants Doria, Knight, King, Soucek, Lepic, and Wilkosz.

"35) Unable to solve the case, Defendants Doria, Fitzsimmons, Knight and King convened a special DuPage County `investigative' grand jury, devoted solely to investigating the Nicarico case." App. 8–10.

1985. The principal evidence against him was provided by Robbins, the North Carolina anthropologist. Because the jury was unable to reach a verdict on the charges against petitioner, the trial judge declared a mistrial. Petitioner remained in prison for two more years, during which a third party confessed to the crime and the prosecutors prepared for his retrial. After Robbins died, however, all charges against him were dropped. He was released, and filed this action.

We are not concerned with petitioner's actions against the police officers (who have asserted the defense of qualified immunity), against the expert witnesses (whose trial testimony was granted absolute immunity by the District Court, App. 53–57), and against DuPage County (whose motion to dismiss on other grounds was granted in part, *id.*, at 57–61). At issue here is only the action against the prosecutors, who moved to dismiss based on their claim to absolute immunity. The District Court held that respondents were entitled to absolute immunity for all claims except the claim against Fitzsimmons based on his press conference. *Id.*, at 53. With respect to the claim based on the alleged fabrication of evidence, the District Court framed the question as whether the effort "to obtain definitive boot evidence linking [petitioner to the crime] was in the nature of acquisition of evidence or in the nature of evaluation of evidence for the purpose of initiating the criminal process." *Id.*, at 45. The Court concluded that it "appears" that it was more evaluative than acquisitive.

Both petitioner and Fitzsimmons appealed, and a divided panel of the Court of Appeals for the Seventh Circuit ruled that the prosecutors had absolute immunity on both claims. *Buckley* v. *Fitzsimmons,*

919 F. 2d 1230 (1990). In the Court of Appeals' view, "damages remedies are unnecessary," *id.*, at 1240, when "[c]ourts can curtail the costs of prosecutorial blunders . . . by cutting short the prosecution or mitigating its effects," *id.*, at 1241. Thus, when "out-of-court acts cause injury only to the extent a case proceeds" in court, *id.*, at 1242, the prosecutor is entitled to absolute immunity and "the defendant must look to the court in which the case pends to protect his interests," *id.*, at 1241. By contrast, if "a constitutional wrong is complete before the case begins," the prosecutor is entitled only to qualified immunity. *Id.*, at 1241–1242. Applying this unprecedented theory to petitioner's allegations, the Court of Appeals concluded that neither the press conference nor the fabricated evidence caused any constitutional injury independent of the indictment and trial. *Id.*, at 1243, 1244.[2]

Judge Fairchild dissented in part. He agreed with the District Court that Fitzsimmons was entitled only to qualified immunity for his press statements. He

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[2]With respect to an issue not before us, petitioner's claims that he was subject to coercive interrogations by some of the respondent prosecutors, the court found that the extent of immunity depended on the nature of those claims. The court reasoned that, because claims based on *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and the Self-Incrimination Clause of the Fifth Amendment depend on what happens at trial, prosecutors are entitled to absolute immunity for those claims; by contrast, only qualified immunity is available against petitioner's claims as to "coercive tactics that are independently wrongful." 919 F. 2d, at 1244. Because it could not characterize the nature of those claims, the court remanded for further proceedings concerning Fitzsimmons, King, and Knight on this issue. *Id.*, at 1245.

noted that the majority had failed to examine the particular function that Fitzsimmons was performing, and concluded that conducting a press conference was not among "the functions that entitle judges and prosecutors in the judicial branch to absolute immunity." *Id.,* at 1246 (opinion dissenting in part and concurring in part). Responding directly to the majority's reasoning, he wrote:

> "It is true that procedures afforded in our system of justice give a defendant a good chance to avoid such results of prejudicial publicity as excessive bail, difficulty or inability of selecting an impartial jury, and the like. These procedures reduce the cost of impropriety by a prosecutor, but I do not find that the courts have recognized their availability as a sufficient reason for conferring immunity." *Ibid.*

We granted Buckley's petition for certiorari, vacated the judgment, and remanded the case for further proceedings in light of our intervening decision in *Burns* v. *Reed*, 500 U. S. ___ (1991). 502 U. S. ___ (1991). On remand, the same panel, again divided, reaffirmed its initial decision, with one modification not relevant here. 952 F. 2d 965 (CA7 1992) *(per curiam)*. The Court of Appeals held that "[n]othing in *Burns* undermine[d]" its initial holding that prosecutors are absolutely immune for "normal preparatory steps"; unlike the activities at issue in *Burns*, "[t]alking with (willing) experts is trial preparation." 952 F. 2d, at 966–967. In similar fashion, the court adhered to its conclusion that Fitzsimmons was entitled to absolute immunity for conducting the press conference. The court recognized that the press conference bore some similarities to the conduct in *Burns* (advising the police as to the propriety of an arrest). It did not take place in court, and it was not part of the prosecutor's trial preparation. 952 F. 2d, at 967. The difference,

according to the court, is that "[a]n arrest causes injury whether or not a prosecution ensues," whereas the only constitutional injury caused by the press conference depends on judicial action. *Ibid.* Judge Fairchild again dissented. He adhered to his earlier conclusion that Fitzsimmons was entitled to only qualified immunity for the press conference, but he was also persuaded that *Burns* had drawn a line between "`conduct closely related to the judicial process'" and conduct in the role of "`administrator or investigative officer.'" He agreed that trial preparation falls on the absolute immunity side of that line, but felt otherwise about the search for favorable evidence that might link the bootprint to petitioner during "a year long pre-arrest and pre-indictment investigation" aggressively supervised by Fitzsimmons. *Id.*, at 969 (opinion dissenting in part).

We granted certiorari for a second time, limited to issues relating to prosecutorial immunity. 506 U. S. ___ (1992).[3] We now reverse.

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[3]Although petitioner also alleged that respondents violated his constitutional rights in presenting the fabricated evidence to the grand jury and his trial jury, see App. 10–11, 14–15, we are not presented with any question regarding those claims. The Court of Appeals agreed with the District Court, see *id.,* at 45–47, and held that those actions were protected by absolute immunity. *Buckley* v. *Fitzsimmons,* 919 F. 2d 1230, 1243 (1990) ("The selection of evidence to present to the grand jurors, and the manner of questioning witnesses, can no more be the basis of liability than may the equivalent activities before the petit jury"). That decision was made according to traditional principles of absolute immunity under §1983, however, and did not depend on the original, injury-focused theory of absolute prosecutorial immunity with which we are concerned here; nor was

The principles applied to determine the scope of immunity for state officials sued under Rev. Stat. 1979, as amended, 42 U. S. C. §1983 are by now familiar. Section 1983 on its face admits of no defense of official immunity. It subjects to liability "[e]very person" who, acting under color of state law, commits the prohibited acts. In *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), however, we held that Congress did not intend §1983 to abrogate immunities "well grounded in history and reason." Certain immunities were so well established in 1871, when §1983 was enacted, that "we presume that Congress would have specifically so provided had it wished to abolish" them. *Pierson* v. *Ray*, 386 U. S. 547, 554–555 (1967). See also *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981). Although we have found immunities in §1983 that do not appear on the face of the statute, "[w]e do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy." *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984). "[O]ur role is to interpret the intent of Congress in enacting §1983, not to make a freewheeling policy choice." *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986).

Since *Tenney*, we have recognized two kinds of immunities under §1983. Most public officials are entitled only to qualified immunity. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 807 (1982); *Butz* v. *Economou*, 438 U. S. 478, 508 (1978). Under this form of immunity, government officials are not subject to damages liability for the performance of their discretionary functions when "their conduct does not violate clearly established statutory or

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it included within the questions presented in petitioner's petition for certiorari.

constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald,* 457 U. S., at 818. In most cases, qualified immunity is sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz* v. *Economou*, 438 U. S., at 506.

We have recognized, however, that some officials perform "special functions" which, because of their similarity to functions that would have been immune when Congress enacted §1983, deserve absolute protection from damages liability. *Id.*, at 508. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Burns* v. *Reed*, 500 U. S., at ___ (slip op., at 6); *Antoine* v. *Byers & Anderson, Inc.*, 508 U. S. ___, ___, and n. 4 (1993) (slip op., at 3, and n. 4). Even when we can identify a common-law tradition of absolute immunity for a given function, we have considered "whether §1983's history or purposes nonetheless counsel against recognizing the same immunity in §1983 actions." *Tower* v. *Glover*, 467 U. S., at 920. Not surprisingly, we have been "quite sparing" in recognizing absolute immunity for state actors in this context. *Forrester* v. *White*, 484 U. S. 219, 224 (1988).

In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a "functional approach," see, *e.g., Burns*, 500 U. S., at ___ (slip op., at 6), which looks to "the nature of the function performed, not the identity of the actor who performed it." *Forrester* v. *White*, 484 U. S., at 229. We have twice applied this approach in determining whether the functions of contemporary prosecutors are entitled to absolute immunity.

In *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), we

held that a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including presentation of the state's case at trial. Noting that our earlier cases had been "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it", *id.*, at 421, we focused on the functions of the prosecutor that had most often invited common law tort actions. We concluded that the common-law rule of immunity for prosecutors was "well settled" and that "the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under §1983." *Id.*, at 424. Those considerations[4] supported a rule of absolute immunity for conduct of prosecutors that was "intimately associated with the judicial phase of the criminal process." *Id.*, at 430. In concluding that "in initiating a prosecution and in presenting the State's case, the

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[4]In particular, we expressed concern that fear of potential liability would undermine a prosecutor's performance of his duties by forcing him to consider his own potential liability when making prosecutorial decisions and by diverting his "energy and attention . . . from the pressing duty of enforcing the criminal law." *Imbler* v. *Pachtman*, 424 U. S., at 424–425. Suits against prosecutors would devolve into "a virtual retrial of the criminal offense of a new forum," *id.*, at 425, and would undermine the vigorous enforcement of the law by providing a prosecutor an incentive not "to go forward with a close case where an acquittal likely would trigger a suit against him for damages." *Id.*, at 426, and n. 24. We also expressed concern that the availability of a damages action might cause judges to be reluctant to award relief to convicted defendants in post-trial motions. *Id.*, at 427.

prosecutor is immune from a civil suit for damages under §1983," we did not attempt to describe the line between a prosecutor's acts in preparing for those functions, some of which would be absolutely immune, and his acts of investigation or "administration," which would not. *Id.*, at 431, and n. 33.

We applied the *Imbler* analysis two Terms ago in *Burns* v. *Reed*, 500 U. S. ___ (1991). There the §1983 suit challenged two acts by a prosecutor: (1) giving legal advice to the police on the propriety of hypnotizing a suspect and on whether probable cause existed to arrest that suspect, and (2) participating in a probable-cause hearing. We held that only the latter was entitled to absolute immunity. Immunity for that action under §1983 accorded with the common-law absolute immunity of prosecutors and other attorneys for eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during, and related to, judicial proceedings. *Id.,* at ___–___ (slip op., at 9–10); *id.*, at ___ (slip op., at 6) (SCALIA, J., concurring in judgment in part and dissenting in part). Under that analysis, appearing before a judge and presenting evidence in support of a motion for a search warrant involved the prosecutor's "`role as advocate for the State.'" *Id.*, at ___ (slip op., at 10), quoting *Imbler*, 424 U. S., at 431, n. 33. Because issuance of a search warrant is a judicial act, appearance at the probable-cause hearing was "`intimately associated with the judicial phase of the criminal process,'" *Burns*, 500 U. S., at ___ (slip op., at 11), quoting *Imbler*, 424 U. S., at 430.

We further decided, however, that prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police. We were unable to identify any historical or common-law support for absolute immunity in the performance of this function. 500 U. S., at ___–___ (slip op., at 12–13).

We also noted that any threat to the judicial process from "the harassment and intimidation associated with litigation" based on advice to the police was insufficient to overcome the "[a]bsen[ce] [of] a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*." *Id.*, at ___ (slip op., at 13–14). And though we noted that several checks other than civil litigation prevent prosecutorial abuses in advising the police, "one of the most important checks, the judicial process," will not be effective in all cases, especially when in the end the suspect is not prosecuted. *Id.*, at ___–___ (slip op., at 15–16). In sum, we held that providing legal advice to the police was not a function "closely associated with the judicial process." *Id.*, at ___ (slip op. at 15).

In this case the Court of Appeals held that respondents are entitled to absolute immunity because the injuries suffered by petitioner occurred during criminal proceedings. That holding is contrary to the approach we have consistently followed since *Imbler*. As we have noted, the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful. The location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages (a question that this case does not present, see *supra*, at 1). It is irrelevant, however, to the question whether the conduct of a prosecutor is protected by absolute immunity. Accordingly, although the Court of Appeals' reasoning may be relevant to the proper resolution of issues that are not before us, it does not provide an acceptable basis for concluding that either the preindictment fabrication of evidence or the

postindictment press conference was a function protected by absolute immunity. We therefore turn to consider each of respondents' claims of absolute immunity.

We first address petitioner's argument that the prosecutors are not entitled to absolute immunity for the claim that they conspired to manufacture false evidence that would link his boot with the bootprint the murderer left on the front door. To obtain this false evidence, petitioner submits, the prosecutors shopped for experts until they found one who would provide the opinion they sought. App. 7–9. At the time of this witness shopping the assistant prosecutors were working hand in hand with the sheriff's detectives under the joint supervision of the sheriff and state's attorney Fitzsimmons.

Petitioner argues that *Imbler*'s protection for a prosecutor's conduct "in initiating a prosecution and in presenting the State's case," 424 U. S., at 431, extends only to the act of initiation itself and to conduct occurring in the courtroom. This extreme position is plainly foreclosed by our opinion in *Imbler* itself. We expressly stated that "the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom," and are nonetheless entitled to absolute immunity. *Id.,* at 431, n. 33. We noted in particular that an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity because it was "fairly within [the prosecutor's] function as an advocate." *Id.*, at 430, n. 32. To be sure, *Burns* made explicit the point we had reserved in *Imbler*, 424 U. S., at 430–431, and n. 33: A prosecutor's administrative duties and those investigatory functions that do not relate to an

advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. See *Burns*, 500 U. S., at ___ (slip op., at 15). We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

On the other hand, as the function test of *Imbler* recognizes, the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. Qualified immunity "`represents the norm'" for executive officers, *Malley* v. *Briggs*, 475 U. S., at 340, quoting *Harlow* v. *Fitzgerald*, 457 U. S., at 807, so when a prosecutor "functions as an administrator rather than as an officer of the court" he is entitled only to qualified immunity. *Imbler*, 424 U. S., at 431, n. 33. There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Hampton* v. *Chicago*, 484 F. 2d 602, 608 (CA7 1973) (internal quotation marks omitted), cert. denied, 415 U. S. 917 (1974). Thus, if a prosecutor plans and executes a raid on a suspected weapons

cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." 484 F. 2d, at 608–609.

The question, then, is whether the prosecutors have carried their burden of establishing that they were functioning as "advocates" when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by petitioner's foot. A careful examination of the allegations concerning the conduct of the prosecutors during the period before they convened a special grand jury to investigate the crime provides the answer. See *supra*, at 3, n. 1. The prosecutors do not contend that they had probable cause to arrest petitioner or to initiate judicial proceedings during that period. Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.[5]

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[5]Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, as the dissent points out, *post*, at 10, a prosecutor may engage in "police investigative work" that is entitled to only qualified immunity.

Furthermore, there is no "true anomaly," *post*, at 6, in denying absolute immunity for a state actor's investigative acts made before there is probable cause to have a suspect arrested just because a prosecutor would be entitled to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict. That criticism ignores the essence of the function test. The reason that lack of probable cause allows us to deny absolute immunity to a state actor for the former function (fabrication of evidence) is that there is no common-law tradition of immunity for it, whether

It was well after the alleged fabrication of false evidence concerning the bootprint that a special grand jury was impaneled. And when it finally was convened, its immediate purpose was to conduct a more thorough investigation of the crime—not to return an indictment against a suspect whom there was already probable cause to arrest. Buckley was not arrested, in fact, until 10 months after the grand jury had been convened and had finally indicted him. Under these circumstances, the prosecutors' conduct occurred well before they could properly claim to be acting as advocates. Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of §1983. It therefore remains protected only by qualified immunity.

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performed by a police officer or prosecutor. The reason that we grant it for the latter function (malicious prosecution) is that we have found a common-law tradition of immunity for a prosecu-tor's decision to bring an indictment, whether he has probable cause or not. By insisting on an equation of the two functions merely because a prosecutor might be subject to liability for one but not the other, the dissent allows its particular policy concerns to erase the function test it purports to respect.

In general, the dissent's distress over the denial of absolute immunity for prosecutors who fabricate evidence regarding unsolved crimes, *post*, at 4–5, like the holding of the Court of Appeals, seems to conflate the question whether a §1983 plaintiff has stated a cause of action with the question whether the defendant is entitled to absolute immunity for his actions.

After *Burns*, it would be anomalous, to say the least, to grant prosecutors only qualified immunity when offering legal advice to police about an unarrested suspect, but then to endow them with absolute immunity when conducting investigative work themselves in order to decide whether a suspect may be arrested.[6] That the prosecutors later called a grand jury to consider the evidence this work produced does not retroactively transform that work from the administrative into the prosecutorial.[7] A

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[6]Cf. *Burns* v. *Reed*, 500 U. S. ___, ___ (1991) (slip op., at 15): "Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. . . . Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." If the police, under the guidance of the prosecutors, had solicited the allegedly "fabricated" testimony, of course, they would not be entitled to anything more than qualified immunity.

[7]See *Imbler* v. *Pachtman*, 424 U. S. 409, 431, n. 33 (1976): "Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence. At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them." Although the respondents rely on the first sentence of this passage to suggest that a prosecutor's actions in "obtaining, reviewing, and evaluating" evidence are always protected by

prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as "preparation" for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial. When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same.

We next consider petitioner's claims regarding Fitzsimmons' statements to the press. Petitioner alleged that, during the prosecutor's public announcement of the indictment, Fitzsimmons made false assertions that numerous pieces of evidence, including the bootprint evidence, tied Buckley to a burglary ring that committed the Nicarico murder. App. 12. Petitioner also alleged that Fitzsimmons released mug shots of him to the media, "which were prominently and repeatedly displayed on television and in the newspapers." *Ibid.* Petitioner's legal theory is that "[t]hese false and prejudicial statements inflamed the populace of DuPage County against" him, *ibid.;* see also *id.*, at 14, thereby defaming him, resulting in deprivation of his right to a fair trial, and causing the jury to deadlock rather than acquit, *id.*, at 19.

Fitzsimmons' statements to the media are not entitled to absolute immunity. Fitzsimmons does not suggest that in 1871 there existed a common-law

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absolute immunity, the sentence that follows qualifies that suggestion. It confirms that some of these actions may fall on the administrative rather than the judicial end of the prosecutor's activities, and therefore be entitled only to qualified immunity.

immunity for a prosecutor's, or attorney's, out-of-court statement to the press. The Court of Appeals agreed that no such historical precedent exists. 952 F. 2d, at 967. Indeed, while prosecutors, like all attorneys, were entitled to absolute immunity from defamation liability for statements made during the course of judicial proceedings and relevant to them, see *Burns*, 500 U. S., at ___–___ (slip op., at 9–10); *Imbler*, 424 U. S., at 426, n. 23; *id.*, at 439 (WHITE, J., concurring in judgment), most statements made out-of-court received only good-faith immunity. The common-law rule was that "[t]he speech of a counsel is privileged by the occasion on which it is spoken . . . ." *Flint* v. *Pike*, 4 Barn. & Cress. 473, 478, 107 Eng. Rep. 1136, 1138 (K. B. 1825) (Bayley, J.).[8]

The functional approach of *Imbler*, which conforms to the common-law theory, leads us to the same conclusion. Comments to the media have no functional tie to the judicial process just because they

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[8]"[Absolute immunity] does not apply to or include any publication of defamatory matter before the commencement, or after the termination of the judicial proceeding (unless such publication is an act incidental to the proper initiation thereof, or giving legal effect thereto); nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings." Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum. L. Rev. 463, 489 (1909) (footnotes omitted). See *e.g., Viosca* v. *Landfried*, 140 La. 610, 615, 73 So. 698, 700 (1916); *Youmans* v. *Smith*, 153 N.Y. 214, 220–223, 47 N.E. 265, 267–268 (1897). See also G. Bower, Law of Actionable Defamation 103, n. *h*, 104–105 (1908).

are made by a prosecutor. At the press conference, Fitzsimmons did not act in "`his role as advocate for the State,'" *Burns* v. *Reed, supra*, at ___ (slip op., at 10), quoting *Imbler* v. *Pachtman,* 424 U. S., at 431, n. 33. The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions. Statements to the press may be an integral part of a prosecutor's job, see National District Attorneys Assn., National Prosecution Standards 107, 110 (2d ed. 1991), and they may serve a vital public function. But in these respects a prosecutor is in no different position than other executive officials who deal with the press, and, as noted above, *supra*, at 8–9, 18, qualified immunity is the norm for them.

Fitzsimmons argues nonetheless that policy considerations support extending absolute immunity to press statements. Brief for Respondents 30–33. There are two responses to his submissions. First, "[w]e do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy." *Tower* v. *Glover*, 467 U. S., at 922–923. When, as here, the prosecutorial function is not within the advocate's role and there is no historical tradition of immunity on which we can draw, our inquiry is at an end. Second, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties." *Burns* v. *Reed*, 500 U. S., at ___ (slip op., at 6). Even if policy considerations allowed us to carve out new absolute immunities to liability for constitutional wrongs under §1983, we see little reason to suppose that qualified immunity would provide adequate protection to prosecutors in their provision of legal advice to the police, see *id.*, at ___–___ (slip op., at 14–15), yet would fail to provide sufficient protection in the

present context.[9]

In his complaint, petitioner also charged that the prosecutors violated his rights under the Due Process Clause through extraction of statements implicating him by coercing two witnesses and paying them money. App. 9–11, 19. The precise contours of these claims are unclear, and they were not addressed below; we leave them to be passed on in the first instance by the Court of Appeals on remand.

As we have stated, *supra*, at 1, 4–5, and n. 2, petitioner does not challenge many aspects of the Court of Appeals' decision, and we have not reviewed them; they remain undisturbed by this opinion. As to the two challenged rulings on absolute immunity, however, the judgment of the United States Court of

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[9]The circuits other than the Seventh Circuit that have addressed this issue have applied only qualified immunity to press statements, see *e.g., Powers* v. *Coe*, 728 F. 2d 97, 103 (CA2 1984); *Marrero* v. *Hialeah*, 625 F. 2d 499, 506–507 (CA5 1980), cert. denied, 450 U. S. 913 (1981); *Gobel* v. *Maricopa County*, 867 F. 2d 1201, 1205 (CA9 1989); *England* v. *Hendricks*, 880 F. 2d 281, 285 (CA10 1989), cert. denied, 493 U. S. 1078 (1990); *Marx* v. *Gumbinner*, 855 F. 2d 783, 791 (CA11 1988); cf. *Rose* v. *Bartle*, 871 F. 2d 331, 345–346 (CA3 1989), yet Fitzsimmons has not suggested that prosecutors in those Circuits have been unduly constrained in keeping the public informed of pending criminal prosecutions. We also do not perceive why anything except a firm common-law rule should entitle a prosecutor to absolute immunity for his statements to the press when nonprosecutors who make similar statements, for instance, an attorney general's press spokesperson or a police officer announcing the return of an indictment, receive only qualified immunity.

Appeals for the Seventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.