The online postgraduate journal of the College of Arts, Celtic Studies and Social Sciences

Justice Done? An Analysis of One Aspect to the 2006 Irish High Court Ruling in *Zappone and Gilligan v. Revenue Commissioners and Attorney General*

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In this article, I conduct an analysis of extracts from the 2006 High Court ruling in the matter of *Zappone and Gilligan v. Revenue Commissioners and Attorney General*. This case centred on the issue of same-sex marriage in Ireland. While there were a number of important aspects to this ruling, I elaborate on one issue, i.e. child development in the context of the parenting that is done by lesbians and gay men. I focus on some of the research studies that informed expert witness testimony on behalf of the plaintiffs and the State in this case. Firstly, I provide an analysis of some of the research findings in an American study, which denoted a review of a number of child development research studies that were conducted in the 1980s and 1990s. In that regard, I problematise the routine reproduction of heteronormativity. With regard to the State's case, I discuss the interpretation of a research study that was conducted in the 1980s by a team of researchers in the United States. I also highlight aspects of an affidavit that was initially sworn into evidence in a same-sex marriage case in Canada. I discern errors in some of this expert testimony that was enunciated and interpreted with a view to furthering the Irish State's case. Neither the routine reproduction of heteronormativity, nor the repeated articulation of erroneous testimony garnered attention in the High Court. I argue that these dynamics denote problematic aspects to the ruling in *Zappone and Gilligan v. Revenue Commissioners and Attorney General*.

Introduction

The recognition and protection of constitutional rights is a fundamental precept, not least because their denial diminishes us as a society. In Ireland, personal rights, such as the right to marry, are provided for in the equality provisions of Article 40 of the *Irish Constitution* (1937).[1] Because Western democracies and societies, including Ireland, tend to be organised according to social norms that are grounded in assumptions surrounding gender and sexual orientation, for example, the imperative to recognise and protect constitutional rights is particularly acute *vis-à-vis* minority cohorts of our population, such as lesbians and gay men. However, in the matter of *Zappone and Gilligan v. Revenue Commissioners and Attorney General* ([2008] 2 I.R. 417),[2] which centred on the issue of same-sex marriage in Ireland,[3] it

[1] In *Ryan v. Attorney General*, Justice Kenny ruled in the High Court that the right to marry denotes a personal right that is provided for in Article 40, even though it is not expressly stated in our Constitution. The Supreme Court accepted this interpretation of Article 40 (see [1965] I.R. 294, at p.313 and pp.344-345). See also *Irish Constitution (1937) / Bunreacht na hÉireann* (1937).
[2] Hereafter, I will refer to this case as *Zappone and Gilligan*.
[3] It is necessary to attach the prefix 'same-sex' to the term 'marriage' so as to acknowledge the issue of marriage inequality. While this tends to take opposite-sex marriage as the given norm, this is precisely the situation that

was determined that such persons do not have a constitutional right to marry. It is important to make the point that there were a number of reasons why the plaintiffs lost their High Court action in 2006, including the legislative backdrop[4] (see [2008] 2 I.R. 417, at paras. 243-244), and the constitutional context *vis-à-vis* marriage and family, which I will highlight presently.

Another dynamic that led to the denial of the plaintiffs' case centred on the issue of child development in the context of the parenting that is done by lesbians and gay men (see [2008] 2 I.R. 417, at paras. 216-221). While this case did not pertain to the right to parent or the capacity to parent, much of the evidence in *Zappone and Gilligan* centred on the issue of child development in the context of lesbian or gay parenting (see [2008] 2 I.R. 417, at paras. 31-69).[5] Some of the research that has been conducted in this area informed expert witness testimony that was enunciated over the course of these High Court proceedings. With regard to some of the child development research that was interpreted by an expert witness for the plaintiffs, I elaborate on the manner in which heteronormativity was routinely reproduced. This is important because heteronormativity denotes a social phenomenon that 'justifies'[6] the exclusion of same-sex couples from the institution of marriage. In this article, I also focus on some of the State's evidence that largely hinged on the following: not enough is known about child development in the context of lesbian and gay parenting; some of this research is methodologically flawed (for example, see [2008] 2 I.R. 417, at paras. 46-61). The interpretation of this evidence in the High Court raised some doubt about the evidence and expertise of a researcher who testified on behalf of the plaintiffs in *Zappone and Gilligan*. Taken in conjunction with the legislative and constitutional backdrop, the latter of which I will highlight presently, all of these elements coalesced, and informed the outcome of this case. Before critiquing the child development research and its interpretation in the High Court, I elaborate on the circumstances that led to two women taking this case in the first instance.

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prevails in Ireland. My preference is to use the term 'marriage equality', which holds that the right of lesbians and gay men to marry is underpinned by the fundamental principle of equality (see Pillinger, 2008).

[4] Section 2.2(e) of the *Civil Registration Act 2004* stipulates that there is an impediment to marriage if both parties are of the same sex. As regards their claims, the plaintiffs did not incorporate this legislation into their written submission to the High Court in 2004. It came into effect in 2005, i.e. one year after the granting of a judicial review regarding their claims. The legislation was not challenged over the course of these High Court proceedings. Nonetheless, the court held that the legislation was in force and was indicative of the prevailing understanding as to the capacity to marry (see [2008] 2 I.R. 417, at paras. 74-79 and para. 244). See http://www.oireachtas.ie/documents/bills28/acts/2004/a304.pdf for details of this legislation.

[5] Heteronormativity dictates that institutionalised heterosexuality denotes the standard for legitimate social and sexual relations (see Ingraham, 2007, p.199). This helps to explain why it is unnecessary to attach the prefix 'heterosexual' to the term 'parent', while the converse is the case *vis-à-vis* the parenting that is done by lesbians or gay men. I accept that the terms 'gay parenting' and 'lesbian parenting' are reductive in that they posit non-normative sexual orientations as defining characteristics that are somehow relevant to doing parenthood. However, the routine operationalisation of heteronormativity, which problematises such parenting precisely on that basis, necessitates the use of such terms.

[6] Throughout this article, I use 'scare quotes' to signal a contentious representation of terms (see Fairclough, 2000, p.173), such as 'justifies'. This is in keeping with my politics in that I support the premise of marriage equality.

Background to the *Zappone and Gilligan* Case

The plaintiffs in this case are Katherine Zappone and Ann Louise Gilligan, who have lived as a couple in Ireland since 1983. Together since 1981, they married each other in British Columbia, Canada, in September 2003. This was possible for two reasons: this Canadian province did not require citizenship or residency as preconditions for issuing a marriage license; marriages between persons of the same sex have been legal there since the ruling in *Barbeau v. British Columbia (Attorney General)*, which the Court of Appeal handed down in May 2003 (see [2003] BCCA 251). In April 2004, Katherine Zappone and Ann Louise Gilligan sought confirmation from the Registrar General in Ireland that their marriage was legally binding in this jurisdiction. In May 2004, that office stated that it was not within its remit to make a declaration on the validity of a marriage that occurred outside Ireland.[7] Katherine Zappone and Ann Louise Gilligan also contacted the Revenue Commissioners in Ireland in April 2004 because they wished to be treated as a married couple for taxation purposes. This was refused in July 2004. The plaintiffs then sought leave to apply for a judicial review in respect of that decision. The High Court granted this in November 2004. Their case subsequently came before that court in October 2006. In their pleadings, Katherine Zappone and Ann Louise Gilligan asserted that the refusal to treat them as a married couple breached their constitutional rights under Articles 40 and 41 of the *Irish Constitution (1937)*, and Articles 8, 12 and 14 of the *European Convention on Human Rights* (ECHR).[8] Justice Dunne gave her ruling in December 2006.[9] The plaintiffs lost their High Court action (see [2008] 2 I.R. 417, at para. 257).[10]

[7] The General Register Office is the central civil repository for records relating to marriages in Ireland. Marriages that take place outside Ireland are normally registered in the country in which they occur, and are not registered here. The General Register Office has no function as regards advising on or registering marriages that take place outside this jurisdiction. Indeed, there is no facility for registering such marriages in Ireland. The civil marriage certificate is normally accepted as legal proof of marriage. In cases where serious doubt exists as to whether the marriage is recognised in Irish law, legal advice can be sought, and an application can be made to the Circuit Family Court for a ruling under Section 29 of the *Family Law Act 1995* as to whether the marriage is recognised under Irish law. I garnered this information from General Register Office (2013).

[8] See Registry of the European Court of Human Rights (2010) for details of these articles. The plaintiffs' reliance on the ECHR implies obligations on the part of the Irish State. These derive from our ratification of the ECHR, and the fact that it forms part of Irish law, following the enactment of the *European Convention on Human Rights Act 2003* (see Walsh and Ryan, 2006, pp.38-41). The manner in which the ECHR was incorporated into Irish law is such that our Constitution remains a superior source of law **(**see Hogan, 2004, pp.33-34; Walsh and Ryan, 2006, p.40**)**. This means that if aspects to the ECHR conflict with principles that are elucidated in our Constitution, the latter will prevail **(**Walsh and Ryan, 2006, p.40**)**.

[9] I garnered the information thus far from the reported judgment (see [2008] 2 I.R. 417, at paras. 1-6).

[10] Katherine Zappone and Ann Louise Gilligan appealed this decision to the Supreme Court. In 2011, they tried to incorporate additional evidence into their appeal. Specifically, they sought to test the constitutionality of the *Civil Registration Act 2004*. However, this was ultimately denied. They subsequently withdrew their Supreme Court appeal. Katherine Zappone and Ann Louise Gilligan have initiated a new High Court action in which they will challenge the constitutionality of this 2004 legislation. I garnered this information through personal communication with Dr. Zappone in 2011 and Marriage Equality in 2012. The latter is an Irish organisation that campaigns for the right of lesbians and gay men to marry. See http://www.marriagequality.ie for details on this organisation.

Extract I

The following extract from the reported judgment in *Zappone and Gilligan* indicates part of the rationale for 'justifying' the exclusion of same-sex couples from the institution of marriage in Ireland:

> The final point I would make on this topic is that if there is in fact any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provides the necessary justification. The other ground of justification must surely lie in the issue as to the welfare of children. Much of the evidence in this case dealt with this issue. Until such time as the state of knowledge as to the welfare of children is more advanced, it seems to me that the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare. ([2008] 2 I.R. 417, at para. 248)

The first 'justification' in the above extract from the ruling stems from what could be conceived of as the dominant understanding of marriage and family in Ireland, which is deemed to derive from Article 41 of our Constitution. This holds that marriage denotes the union of a man and woman, as family. Whilst the terms 'marriage' and 'family' are not defined in Article 41,[11] this understanding of marriage and family has been consistently enunciated through case law in our constitutional courts.[12] Taken in conjunction with the legislative backdrop, which was deemed to be indicative of the prevailing understanding of marriage in Ireland (see [2008] 2 I.R. 417, at para. 243), the High Court was not persuaded to broaden the definition of marriage.[13] Before elaborating on the second ground for 'justifying' the exclusion of same-sex couples from the institution of marriage in Ireland, which denotes the focus of my analysis, I wish to highlight some additional considerations.

Further Considerations

Expert Witnesses

Professor Casey, who was called as an expert witness for the State, is a well-known psychiatrist in Ireland. In *Opinion* pieces and *Letters to the Editor* of *The Irish Times*, which is deemed to be the paper of record in Ireland (see O'Brien, 2008, p.13), she regularly puts forward her views on the nuclear family paradigm and same-sex marriage, the latter of which she opposes (see Casey, 2008a,b,c,d,e,f).

Professor Green is a psychiatrist and lawyer who testified on behalf of the plaintiffs. He has conducted research studies pertaining to child development in the context of non-

[11] With regard to the term 'marriage', see All-Party Oireachtas Committee on the Constitution (2006, p.123) and Working Group on Domestic Partnership (2006, p.23). With regard to the term 'family', see Chief Justice FitzGerald's and Supreme Court Justice Griffin's deliberations in *McGee v. Attorney General and Revenue Commissioners* (see [1974] I.R. 284, at p.302 and p.334 respectively). The term 'Oireachtas' refers to the Irish Houses of Parliament.

[12] See the following cases: *Murray and Murray v. Ireland and Attorney General* ([1985] I.R. 532); *T.F. v. Ireland, Attorney General and M.F.* ([1995] 1 I.R. 321); *B. v. R.* ([1996] 3 I.R. 549); *D.T. v. C.T.* ([2003] 1 I.L.R.M. 321). These cases were alluded to throughout the High Court proceedings in *Zappone and Gilligan*.

[13] For wider discussion on the constitutional position regarding marriage and family, in the context of *Zappone and Gilligan*, see Ennis (2010) and O'Mahony (2010).

normative parenting (for example, see Green, 1978; Green, 1982; Green *et al*, 1986). Since the 1970s, which marked the beginning of the reliance upon expert testimony on homosexuality and lesbianism in court cases in the United States,[14] he has testified in this regard (see Rivera, 1979, p.898).

Professor Nock was a demographer and sociologist who was attached to the University of Virginia in the United States. The inclusion and interpretation of his 2001 affidavit, as evidence to further the Irish State's case in *Zappone and Gilligan*, is indicative of a growing international trend towards conceiving of expert knowledge regarding lesbian and gay parenting as relevant to determining their right to marry.

Professor Waite is a sociologist who is attached to the University of Chicago in the United States. She is co-author of Waite and Gallagher (2000), which was briefly alluded to over the course of these High Court proceedings (see [2008] 2 I.R. 417, at para. 68). She testified on behalf of the State in *Zappone and Gilligan*.

Lesbian and Gay Parenting

While the right to marry is distinct from the right to parent, conceiving of these rights in isolation has its difficulties. Reading Fagan (2011) was instrumental in terms of the development of my thinking in this regard. It denotes a comprehensive audit of the legislative differences that prevail in Ireland between the institution of marriage and our civil partnership infrastructure.[15] Many of these stem from the State's wilful non-recognition of parent-child relationships in families that are headed by (same-sex) civil partners. It is important to acknowledge that some gay and lesbian persons in Ireland, irrespective of their civil status, are also parents (see Valiulis *et al*, 2008, pp.24-55). I argue that all families, irrespective of the sexual orientation of parent(s), have a right to the recognition and protection that can be afforded by our constitutional and/or legislative regimes.[16]

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[14] Rivera (1979, pp.883-904) elaborates on the manner in which anxiety about lesbianism and homosexuality came to the fore in courtrooms, in the context of child custody proceedings in the wake of divorce in the United States. This needs to be understood against the backdrop of the criminalisation of same-sex intimacy in many states at the time (see Rivera, 1979, pp.949-950). Moreover, the rationale behind criminalisation in the United States also needs to be considered, i.e. sexual activity had to be gendered, heterosexual, marital, and procreative (see Eskridge, 1999, p.161). The imperatives of marital procreation and gender complementarity, combined with the embeddedness of prescriptive roles in terms of doing gender in marriage (see Dryden, 1999), would have underscored normative assumptions about the sexual orientation of parents at the time. In the 1970s, gay and lesbian persons began to rail against courts' preoccupation with the presumed immorality of same-sex intimacy, and they began to vigorously defend their right to parent (see Rivera, 1979, pp.897-898). This sparked a growing trend in the inclusion of expert testimony on lesbianism and homosexuality as evidence in court proceedings, of which Professor Green was at the forefront (see Rivera, 1979, pp.897-904). Both the conducting of research, comparing children of lesbian or gay parents with those of heterosexual parents, and the publication of that research, began in the late 1970s in the United States (see Patterson, 1992, p.1029). It is conceivable that these elements coalesced, and created a context in which the elaboration of such research findings in courtrooms became inevitable, once the right to marry became as contested a concept as the right to parent.

[15] Civil partnership was introduced in Ireland with the enactment of the *Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010*. See http://www.oireachtas.ie/documents/bills28/acts/2010/a2410.pdf for details of this legislation.

[16] Marriage (opposite-sex) is the only regime that has both constitutional and legislative status and protection in Ireland. Both civil partnership, which is open to same-sex couples, and a presumptive scheme *vis-à-vis* cohabitation, which applies to opposite-sex and same-sex couples under certain conditions, are provided for in the 2010 legislation.

However, the preponderance of research studies pertaining to lesbian and gay parenting is problematic. Against the backdrop of deeply embedded heteronormative assumptions in society, it presupposes that there is something about this issue that warrants endless attention, analysis, interrogation, and/or investigation by social scientists, expert witnesses, and judges. Some research invariably compares lesbian or gay parenting *to* the unquestioned norm of heterosexual parenting (see Stacey and Biblarz, 2001a, p.162). Some studies seem eager to prove that there are no differences in child developmental outcomes amongst these cohorts of parents. This denotes the 'no-differences' thesis (see Stacey and Biblarz, 2001a, p.163). Some studies seem eager to prove that any manifestation of difference does not denote a deficiency on the part of lesbians or gay men (see Stacey and Biblarz, 2001a, p.162). I argue that the rootedness of heteronormativity is such that research *vis-à-vis* the lesbian or gay 'Other' (see de Beauvoir, 1988, p.16) as parent will need to be conducted into infinity and beyond, until such time as it can be unequivocally proven that this 'suspect' 'Other' is capable of measuring *up* to the unquestioned norm. This perpetual dynamic may account for the preponderance of such research in the first instance, in that their findings are never enough. I refer to these dynamics as the 'we-simply-do-not-know' and 'never-enough' theses. This perpetual quest for answers does not seem to require critical reflection on the great unasked question and unremarked upon phenomenon, i.e. child developmental outcomes *vis-à-vis* the parenting that is done by heterosexuals. I am not suggesting that (this normative) sexual orientation necessarily denotes a variable that must be interrogated in the context of determining the constitutional right to marry. Yet, this is precisely what happened in *Zappone and Gilligan*. I argue that until such time as the operationalisation of heteronormativity in society, as it pertains to parenting, warrants similar attention and analysis, the gay and lesbian 'Other' will remain 'suspect' - always 'out there' in the research study and the courtroom, waiting to be proven or unproven.[17]

Child Development and Child Welfare

I associate the term ‘child development’ with physical, psychological, cognitive, personal, and social development. Relevant issues in this regard include language acquisition, formal education attainment, peer-group relations, and inter-personal skills. The term ‘child welfare’ has a specific connotation, which largely encompasses the protection and safety of children, particularly in relation to the risk or perpetration of abuse, neglect, abandonment, and/or violence. While child development and child welfare are interlinked, I reject their seemingly self-evident conflation in the High Court.[18] I argue that this is indicative of the toxicity of heteronormativity in Ireland.

[17] I wish to acknowledge that the work of Stacey and Biblarz (2001a) was instrumental in terms of the development of my thinking in relation to the operationalisation of heteronormativity in the context of lesbian and gay parenting.

[18] It is important to acknowledge that the plaintiffs' submissions to the High Court referred to the issue of child welfare. The context here is that counsel for the plaintiffs sought to determine what justifications the State might advance in terms of its position on the matter that would eventually come before the High Court. This was unclear from the defence that the State initially filed. So as to make that determination, counsel for the plaintiffs looked to the international context, and the ways in which authorities in other jurisdictions have justified the restricting of the right to marry to heterosexual couples. Four potential justifications were identified: (1) procreation denotes a central feature of marriage; (2) the welfare of children; (3) the definitional argument; (4)

The Reported Judgment

The court record on which I rely over the course of my analysis, i.e. the reported judgment, comprises Justice Dunne's December 2006 recounting of the October 2006 evidence/testimony pertaining to both the plaintiffs' and the State's positions, and her elaboration on the rationale behind her eventual ruling in *Zappone and Gilligan*. The recounting feature has a tendency to morph the voices of expert witnesses and counsel into one, i.e. Justice Dunne's. Therefore, the attribution of text demands constant rigour on my part.

Most of the research studies that were alluded to over the course of these High Court proceedings, including American Academy of Pediatrics (2002)[19] and Green *et al* (1986),[20] were introduced during Professor Green's direct testimony, cross-examination and re-examination (see [2008] 2 I.R. 417, at paras. 31-44). One exception in this regard was Nock (2001),[21] which was discussed as part of Professor Casey's direct testimony and re-examination by counsel for the State (see [2008] 2 I.R. 417, at paras. 48-50 and para. 59). Professor Green's evidence pertained to both research studies and reviews of studies that were published over a period of four decades, i.e. from 1978 to 2002 (see [2008] 2 I.R. 417, at paras 35-36). Prior to giving evidence, Professor Casey was furnished with Professor Nock's affidavit and a statement of Professor Green's evidence (see [2008] 2 I.R. 417, at para. 52). These considerations need to be borne in mind over the course of my analysis.

Extract II

The following extract from the reported judgment in *Zappone and Gilligan* denotes an excerpt from the American Academy of Pediatrics (2002) review:

> None of the children had gender identity confusion, wished to be of the other sex or consistently engaged in cross-gender behaviour. For older children in the study there were no differences in sexual attraction or self-identification as homosexual. The children showed no differences in personality measure, peer group relationship, self-esteem, behavioural difficulties or academic success.
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> [2008] 2 I.R. 417, at para. 35

social disapproval of homosexuality/lesbianism by the majority of the population (see [2008] 2 I.R. 417, at paras. 74-79). On the basis of the evidence that was outlined in court, Justice Dunne asserted that the State did not advance the arguments in relation to (1) procreation or (4) social disapproval, to support its position *vis-à-vis* the exclusion of same-sex couples from the institution of marriage in Ireland (see [2008] 2 I.R. 417, at para. 80). She then stated the following: "In essence therefore the arguments on behalf of the plaintiffs were narrowed down to the definitional argument and the issue in relation to the welfare of children." (see [2008] 2 I.R. 417, at para. 81) The important point here is that it was a particular understanding of what the State might advance, in terms of justifying restrictions on the right to marry, that informed the plaintiffs' counsel's decision to refer to the issue of child welfare.

[19] This denotes a brief overview of a number of research studies pertaining to the issue of child development in the context of lesbian and gay parenting.

[20] Professor Green, who testified on behalf of the plaintiffs in this case, conducted this study with colleagues in the United States.

[21] This denotes an affidavit that was initially sworn into evidence in *Halpern et al v. Attorney General of Canada et al*. Hereafter, I will refer to this case as *Halpern* ([2003] 65 O.R. 3D 161).

In this extract, Justice Dunne is recounting Professor Green's testimony regarding the American Academy of Pediatrics (2002) review. Here however, the recounting feature is problematic because it is difficult to determine whether this extract constitutes Professor Green's verbatim evidence, or whether it is simply meant to denote a summary of his testimony. Either way, it is problematic because it appears to make reference to only one research study. This is misleading because the corresponding text in the 2002 review demonstrates that Extract II refers to many research studies that were conducted throughout the 1980s and 1990s by different teams of researchers. Extract II ignores other basic details that are contained in the 2002 review. For example, it is silent as to the number of children whose development formed the basis of these studies, i.e. over three hundred (see American Academy of Pediatrics, 2002, p.342). Elaborating on such details that are contained in this 2002 review, the inclusion of which was deemed to be pertinent to these High Court proceedings, could have helped in terms of challenging both the 'we-simply-do-not-know' and the 'never-enough' theses, which are rooted in heteronormative anxiety about the 'suspect' 'Other'. I now provide an analysis of each sentence in Extract II above, each of which refers to separate research findings.

The first sentence in Extract II of the reported judgment in *Zappone and Gilligan* (see [2008] 2 I.R. 417, at para. 35), and the 2002 review that it derives from, implicitly take as given, until proven otherwise, the idea that lesbian or gay parenting raises the spectre of gender identity confusion. This tends to conflate or confuse gender and (non normative) sexualities. No indication is given as to the prevalence of this condition in children who are reared by heterosexual parents. This is a reasonable expectation because the abstract to this 2002 journal/review makes reference to such a cohort (see American Academy of Pediatrics, 2002, p.341). This serves to underscore the premise that any link to gender identity confusion in children who are reared by heterosexual parents does not need to inform social scientific endeavour. Rather than investigate the phenomenon of gender identity confusion, or interrogate the normative assumptions that surround it, such silence creates a rather murky space where heteronormative panic can set in. There, the 'suspect' 'Other' becomes the starting point or the focal point for social scientific endeavour. The reported judgment in *Zappone and Gilligan* is silent as to why the research finding about not finding this condition warranted a research question in the first instance. Yet, the American Academy of Pediatrics (2002) review had to form part of expert testimony and evidence in a case that centred on the right to marry. Crucially, in terms of the rationale behind the ruling in *Zappone and Gilligan*, no explanation was required as to why the non-development of gender identity confusion is relevant to the issue of child welfare.

Here, I refer again to the first sentence in Extract II above (see [2008] 2 I.R. 417, at para. 35) and the 2002 review that it comes from. No explanation is offered as to why children or adolescents who are reared by gay or lesbian parents would wish to be of a different sex, or would engage in cross-gender behaviour to the extent that such phenomena would denote research findings deriving from research questions. Such findings about non-findings do nothing to disturb the rootedness of heteronormativity in society. Notwithstanding the imperative to prove the 'no-differences' thesis (see Stacey and Biblarz, 2001a, p.163) because of that normative backdrop, the toxicity of heteronormativity in

Ireland is such that the High Court required no explanation as to why these findings, about phenomena that do not arise, are somehow relevant to the issue of child welfare.

The second sentence in Extract II of the reported judgment (see [2008] 2 I.R. 417, at para. 35), which denotes the recounting of Professor Green's testimony regarding the American Academy of Pediatrics (2002) review, is also problematic. It presupposes that a person's self-identification as gay is necessarily of scientific interest in a way that self-identification as heterosexual is not. The latter is not remarked upon. That socio-cognitive silence implies that the onset of teenage homosexuality self-evidently denotes an issue that warrants attention and analysis, not just by researchers, but also expert witnesses and judges. No indication is given as to why that might be the case. Moreover, there is a failure to interrogate the heteronormative assumptions that are embedded in research questions that inform such research findings. Having said that, it must be acknowledged that Professor Green has, elsewhere, challenged the presumption that homosexuality is 'second best' (see Green, 1982, p.7). Nonetheless, the research finding from the American Academy of Pediatrics (2002) review underscores the premise that it is in the formation and development of sexual orientation in teenagers, who are reared by lesbian or gay parents, that heteronormative anxiety is particularly acute (see Stacey and Biblarz, 2001a, p.163). Crucially, in terms of the second ground for 'justifying' the exclusion of same-sex couples from the institution of marriage in Ireland, the reported judgment is silent as to the relevance of this research finding to the issue of child welfare.

The last sentence in Extract II of the reported judgment (see [2008] 2 I.R. 417, at para. 35) denotes the interpretation of six research studies, including Golombok *et al* (1983), by the American Academy of Pediatrics (2002, p.342). This 1983 study compared two cohorts of parents, i.e. lesbian and heterosexual mothers, and their children on a range of developmental measures. In the study, the first cohort was immediately identified through the lens of sexual orientation, i.e. the lesbian group (see Golombok *et al*, 1983, p.554). However, the second cohort was consistently identified by the status of those women within it as both single and a parent, i.e. the single parent sample (see Golombok *et al*, 1983, p.554). This grounds the idea that it is a particular sexual orientation, rather than the variable of sexual orientation *per se*, which is the starting point or the focal point of social scientific endeavour *vis-à-vis* parenting and child development. This aspect of the research design of Golombok *et al* (1983) warranted no elaboration, either in the American Academy of Pediatrics (2002) review of same, or in the Irish High Court. Crucially, the reported judgment is silent as to the relevance of academic success, for example, to child welfare. Thus far, my analysis has exposed the routine operationalisation of heteronormativity that inheres in, not just Extract II, but also Extract I of the reported judgment (see [2008] 2 I.R. 417, at paras. 35 and 248 respectively).

Extract III

The following extract from the reported judgment in *Zappone and Gilligan* pertains to Professor Casey's testimony in relation to the importance of adhering to standard methodological conventions when conducting social scientific studies, and the relevance of this dynamic *vis-à-vis* her interpretation of the research that formed part of Professor Green's testimony:

> Professor Casey explained that in the affidavit sworn by Professor Nock, he detailed in the first part of it the methodological approaches to be used in epidemiological research of the sort that is concerned with gay and lesbian parenting and the second part of his report dealt with individual studies published in that area and he critiqued each one pointing to the strength and weaknesses of the particular reports. A long discussion then ensued as to the methodology involved in carrying out social research. The discussion ranged over probability samples, snowball sampling, cross-sectional studies and longitudinal studies. There was an explanation as to the need for controls in relation to studies in order to avoid confounding factors. Reference was made to the study of which Professor Green was a co-author in 1986 in which it was noted that 78% of the lesbian parents studied were living with a partner at the time and that only 10% of the heterosexual mothers who were studied had partners living with them at the time. Professor Casey commented that this was an obvious potential confounding factor for which one needed to have a control. It was also noted that so far as such studies have been conducted there appeared to be no studies conducted into the role of parenting by gay men. Having referred to all of these matters, Professor Casey commented that the various studies cited by Professor Green do not meet the criteria required for good epidemiological studies. They did not use probability or random sampling, they were of small sample size by and large and there were confounding factors in some of the studies. Only one of the studies referred to was a longitudinal study. As a result she was of the view that one had to be very cautious in making broad generalisations about the findings of these studies in regard to the general population. A reference was made to the affidavit of Professor Nock to that effect and I quote:-
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> "In my opinion the only *accepted* [my italics] conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence."
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> Having regard to the evidence as it now stands, she could not draw the conclusion that children were not affected by the consequences of a same sex partnership. She stated that the only conclusion she could draw is that we do not know and need studies that are more rigorous than those that are available at the moment.
>
> [2008] 2 I.R. 417, at paras. 48-51

In this extract, emphasis is placed on the importance of conducting rigorous social scientific research. This is a premise that generally recommends itself to researchers who are interested in social phenomena. I now demonstrate how an over thirty-year-old repertoire of social scientific knowledge, *vis-à-vis* child developmental outcomes in the context of lesbian and gay parenting, can be reduced to the 'coherence' of the 'we-simply-do-not-know' and the 'never-enough' theses. These helped to 'justify' the exclusion of same-sex couples from the institution of marriage in Ireland (see [2008] 2 I.R. 417, at paras. 215-221). This will become clear as my analysis evolves.

Because social research is not conducted in a vacuum, I argue that a crucial confounding factor *vis-à-vis* the 'logic' of Extract III above is the historical conceptualisation and criminalisation of same-sex intimacy in the West,[22] with its attendant legacies of inequality and stigma. Against the backdrop of deeply embedded heteronormative assumptions in the United States at the time that Green *et al* (1986) conducted and published

[22] Indeed, over the course of Professor Green's cross-examination, he made reference to the criminalisation of same-sex intimacy in many jurisdictions (see [2008] 2 I.R. 417, at para. 38).

their study,[23] a gay or lesbian parent risked not just social opprobrium, but also that of judges whose preoccupations with the 'Other' exposed the vulnerability of (some) parents in child custody cases.[24] Researching a hidden and frightened cohort of the population (see Patterson, 1992, p.1026) would have been difficult in the United States in the 1980s. It is unlikely that a research team that was concerned about child development and child custody, against a heteronormative and possibly homophobic backdrop, could have had the luxury of employing a large-scale research design, the methods of which satisfied the criteria for good epidemiological studies, as suggested in Extract III above. This begs an immediate question: What precisely does the discipline of Epidemiology have to do with child developmental outcomes in the context of lesbian or gay parenting?[25] This was not remarked upon in the reported judgment. Furthermore, Professor Nock, in his 2001 review of research studies pertaining to child development in the context of lesbian and gay parenting, unquestioningly and inappropriately applied the research design that works best in his discipline, i.e. Demography, to an entirely different discipline, i.e. Child Development/Developmental Psychology (see Stacey and Biblarz, 2001b, p.6).[26] It is unfortunate that Stacey's and Biblarz's (2001b) affidavit in *Halpern* did not denote evidence in *Zappone and Gilligan*. It could have challenged aspects to the sworn/written testimony and articulated testimony in Extract III above (see [2008] 2 I.R. 417, at paras. 48-51).

Another cog in the evidential wheel relates to excerpts from Extract III of the reported judgment that are factually incorrect. The first error is rooted in misreading, rather than misinterpreting, the Green *et al* (1986) study. Here, I refer to the reliance on percentages in Extract III above (see [2008] 2 I.R. 417, at para. 49), which misrepresented basic details about the research cohorts that took part in Green *et al* (1986). Extract III fails to show that while fifty-six percent of the lesbian cohort in that study did live with their partners, twenty-

[23] For example, the decriminalisation of homosexuality at a federal level in the United States did not take place until 2003, on foot of the Supreme Court ruling in *Lawrence et al v. Texas* (see Denniston, 2003).

[24] Rivera (1979, p.900) refers to a custody case in Maine in 1976, in which the court held that the mother was intelligently seeking to minimise, if not totally eliminate, the impact of her lesbian lifestyle on her children, i.e. she did not flaunt her lesbianism. This 'logic' is implicitly informed by heteronormative anxiety about the lesbian 'Other'. It was allayed by the submission of a highly favourable report by a child psychiatrist (see Rivera, 1979, p.900). Rivera (1979, p.898) also alludes to a case in Ohio in 1974 involving a lesbian wherein the judge asked Professor Green, as an expert witness, how sex between lesbians was accomplished? Such voyeurism in a person who had the institutional authority (see Bergvall and Remlinger, 1996, p.476) to decide on the matter before the court is a measure of the toxicity of heteronormativity. Having said that, Rivera (1979, p.901) also makes reference to a custody case in California in 1977, in which the court refused to allow the introduction of evidence surrounding sexual orientation. The judge held that the fitness to parent of both the mother and father denoted the only relevant issue before the court (see Rivera, 1979, p.901).

[25] Professor Casey's recounted testimony is as follows: “Epidemiological studies measure the prevalence and risk factors and outcomes of particular conditions.” (see [2008] 2 I.R. 417, at para. 46) While there is a social dimension to such illnesses as cancer and diabetes, associating medical research regarding disease prevalence and prevention with social research pertaining to lesbian/gay parenting and child development is problematic. It normalises a seemingly self-evident connection between pathology, child development, and (some) parents. Even if a (homo-)sexual orientation were a medical condition, we do not know the specificities of its prevalence in Ireland. The latest census of the population, which took place in 2011, did not ask respondents about their sexual orientation (see Central Statistics Office, 2011). Ticking the box marked 'marital status' in the census form does not enlighten demographers as to the prevalence of any sexual orientation in Ireland. Therefore, when considering the merits of conducting good epidemiological studies, on demographically hidden cohorts of the population, it is important to reflect on why demographers do not ask such questions in the first instance.

[26] Stacey's and Biblarz's (2001b) affidavit was initially sworn into evidence in *Halpern*. It denotes a detailed and trenchant rebuttal of Nock (2001).

two percent lived with female roommates (see Green *et al*, 1986, p.172). Moreover, the ten percent figure regarding the heterosexual cohort actually refers to female roommates and relatives, such as a sister or mother (see Green *et al*, 1986, p.172). Therefore, the relevant excerpt from Extract III above conflates female lovers with female roommates, and male lovers (who did not exist) with female relatives and female roommates. Professor Nock's affidavit contains the same error (see Nock, 2001, pp.60-61). This error would have been obvious from a cursory reading of Green *et al* (1986). It is a reasonable expectation that the author of an affidavit would fully apprise himself of a research study prior to reviewing it and including it in his affidavit. Similarly, it is a reasonable expectation that an expert witness would fully apprise herself of that 1986 study prior to giving an opinion on it. It is unfortunate that these errors did not attract attention over the course of the cross-examination of this expert witness for the State.

Another error in Extract III of the reported judgment centres on the statement about the possible lack of studies regarding the parenting that is done by gay men (see [2008] 2 I.R. 417, at para. 49). Notwithstanding its tentativeness, this claim is patently false. Its ingenuity derives from its caution and imprecision, which inhere in the phrase 'there appeared to be' in Extract III above. It manages to chip away at the foundations of a repertoire of social scientific knowledge surrounding child development in the context of gay male parenting. I now highlight some of the primary research that can reject the persuasiveness of that imprecision in Extract III of the reported judgment. Stacey's and Biblarz's (2001a) review of research studies denoted part of Professor Green's re-examination by counsel for the plaintiffs, and Professor Casey's cross-examination by counsel for the plaintiffs (see [2008] 2 I.R. 417, at paras. 43-44 and paras. 56-57 respectively). Over the course of Professor Green's re-examination, reference was made to gay parents (see [2008] 2 I.R. 417, at para. 43). A number of studies that comprised Stacey's and Biblarz's (2001a, p.169) review pertained to gay male parenting, including Bailey *et al* (1995). This team of researchers interviewed gay fathers and their adult sons with a view to elaborating on the latter's sexual orientation (see Bailey *et al*, 1995, p.125). The Bailey *et al* (1995) study also formed part of Professor Nock's review of child development research in his affidavit (see Nock, 2001, pp.78-79). Professor Nock (2001, p.80) also reviewed a research study that was conducted in the mid to late 1970s, over a period of three years, in Canada and the United States (see Miller, 1979). This study would have been at the cutting-edge of this type of research in North America by virtue of its time line. Miller (1979, pp.544-545) conducted in-depth interviews with both men as fathers, whose age range from youngest to oldest spanned forty years, and their minor or adult children, who ranged in age from young teenagers to persons in their thirties.[27] With regard to the High Court proceedings in *Zappone and Gilligan*, the crucial point here is that, prior to giving evidence, an expert witness was furnished with documentation (see [2008] 2 I.R. 417, at para. 52) that problematises the statement regarding gay male parenting in Extract III above (see [2008] 2 I.R. 417, at para. 49).

[27] Other minor children were not interviewed due to the following: ethical considerations regarding their incapacity to consent; their inability to understand the nature of the research; their lack of knowledge about their fathers' sexual orientation; and the attendant issue of such parents' right to confidentiality (see Miller, 1979, p.545).

The last aspect to my analysis of Extract III centres on the Nock (2001) affidavit. The relevant excerpt from it states the following: “However, in my opinion, the only *acceptable* [my italics] conclusion at this point is that the literature on this topic does not constitute a solid body of scientific evidence.” (Nock, 2001, p.47) The term 'accepted', which forms part of Extract III above (see [2008] 2 I.R. 417, at para. 50), means established or time-honoured. The term 'acceptable', which was used by Nock (2001), means adequate or satisfactory. The term 'accepted' manages to neutralise the caveat that inheres in the phrase 'at this point'. It creates a gulf between 'proper' research that adheres to time-honoured conventions that have been established and maintained through a solid body of scientific evidence, and the 'never enough', i.e. the research that informed Professor Green's testimony, for example, which was conducted and published over a period of four decades (see [2008] 2 I.R. 417, at paras 35-36). The ideological wherewithal of this distinction is such that the recourse to the disciplines of Demography, Epidemiology, and Mathematics in the High Court 'made sense' in a case that centred on the constitutional right to marry.

Extract IV

The inexorable pull and persuasiveness of the percentages in Extract III above was such that the misreading of basic information in the Green *et al* (1986) study was repeated in the High Court. The following extract from the reported judgment in *Zappone and Gilligan* denotes Justice Dunne's recounting of Professor Waite's testimony:

> She was critical of Professor Green's 1986 study in relation to the outcome for children in terms of sexual identity and relationship to their peers which involved a comparison between children brought up by gay parents, 78% of whom had a partner, and children brought up by heterosexual parent[s] of whom only 10% had a partner and she commented that one could not do a comparison in such circumstances. She said that it was extremely important to have a full picture of the methodology used for a particular study and the controls used to exclude confounding or biased factors. Her comment was as follows:-
> “No one should pay any attention to studies that are poorly done. They are just some stories, they really are not science.”
> Finally she indicated that she did not come to her views from any kind of ideological viewpoint in relation to these issues.
>
> [2008] 2 I.R. 417, at para. 67

Here, the ideological distinction between science and story could not be more acute. The repeated error about the living arrangements of the research cohorts that took part in Green *et al* (1986) is utterly spurious. I reiterate that this error could have been immediately discerned from the most cursory reading of that study. It is a reasonable expectation that this expert witness would have fully apprised herself of that 1986 study prior to proffering her expertise on it in the High Court. I argue that it is precisely at the point when an expert is impelled to assert that her position is not ideological, that the morphing of a study into just some story becomes just that. It is precisely that protagonist's agenda that is served by the distinction between science and story in the first instance.

Extract V

The cumulative effect of the complexities and inaccuracies in Extracts III and IV above becomes apparent in the following extract from Justice Dunne's elaboration on part of the rationale behind her ruling in *Zappone and Gilligan*:

> Having considered his evidence carefully, taking on board the evidence that I also heard from Professor Casey and from Professor Waite, I think that one must have some reservation in relation to the conclusions drawn by Professor Green. The phenomenon of parenting by same sex couples is one of relatively recent history. The studies that have taken place are consequently of recent origin. Most of the studies have been cross-sectional studies involving small samples and frequently quite young children. I have to say that based on all of the evidence I heard on this topic I am not convinced that such firm conclusions can be drawn as to the welfare of children at this point in time. It seems to me that further studies will be necessary before a firm conclusion can be reached. […] [S]o far as the evidence is concerned it seems to me that the research into this topic which is of significant importance is not developed to the extent that one could draw such firm conclusions as Professor Green has expressed. The evidence of Patricia Casey largely dealt with the issue of the methodology employed in the various studies described by Professor Green. As is clear from my comments on the evidence of Professor Green, I accepted her evidence in relation to the question of methodology used for conducting the research relied on by Professor Green and commented upon in the affidavit of Professor Nock. It is not necessary to comment further on that issue.
>
> [2008] 2 I.R. 417, at paras. 216-220

This extract is implicitly informed by the 'logic' of the 'we-simply-do-not-know' and the 'never-enough' theses. Their inexorable pull derives from the seemingly self-evident rigour of sworn testimony that was submitted, and expert testimony that was articulated, on behalf of the State in *Zappone and Gilligan*. I have demonstrated that some expert knowers, reviewers, interpreters, and testifiers may not have fully apprised themselves of the evidence on which they proffered their expertise. Yet, the weight of their evidence managed to raise the spectre of doubt about Professor Green's evidence, experience and expertise. Such is the weight that is wrought by heteronormativity in Ireland.

Conclusion

In this article, I conducted an analysis of extracts from the High Court ruling in *Zappone and Gilligan*. While there were a number of dimensions to that ruling, I focused on the issue of child development *vis-à-vis* the parenting that is done by lesbians and gay men. An important consideration in this regard is the rootedness of heteronormativity in society, which impacts upon research that is conducted in this area. I argued that the seemingly self-evident conflation of child development and child welfare denoted one example of the routine reproduction of this social phenomenon. Other manifestations of heteronormativity, in the context of lesbian and gay parenting, include the 'we-simply-do-not-know' and 'never-enough' theses. These invariably revolve around the 'suspect' 'Other'. I also problematised the failure to take cognisance of the fact that social research does not take place in a vacuum, and that considerations, such as the criminalisation of same-sex intimacy, need to be borne in mind when interpreting social research studies pertaining to lesbianism or homosexuality. The

errors that I discerned are perhaps the most damning in terms of the seemingly self-evident rigour of some of the expert witness testimony that furthered the State's case in *Zappone and Gilligan*. The reported judgment is such that the repeated articulation of erroneous testimony did not garner attention in the High Court. Moreover, the routine operationalisation of heteronormativity, which is the dynamic that problematises gay and lesbian parenting in the first instance, went largely unchecked. Until such time as this phenomenon attracts attention and analysis, the gay and lesbian 'Other' will remain 'suspect' - always 'out there' in the research study or the courtroom, waiting for their rights to be affirmed and protected.

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