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I. INTRODUCTION

The legal recognition of same sex relationships is hardly a new concept in Scandinavia.[1] Since 1989, Denmark has paved the way for Scandinavian countries,[2] each of which now recognize some form of "registered partnership" for lesbian and gay couples.[3] The partnership laws provide legal rights for same sex

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1. *See* Kees Waaldijk, *Free Movement of Same-Sex Partners*, 3 MAASTRICHT J. EUR. & COMP. L. 271, 271–77 (1996) [hereinafter Waaldijk, *Free Movement*]; Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 80 (2000) [hereinafter Waaldijk, *Civil Developments*]; Gay & Lesbian Advocates & Defenders, Marriage Fact Sheet (Sept. 2000), *at* http://www.glad.org/ civilunions.html (last visited May 23, 2002). Although Scandinavia traditionally included only Norway, Sweden and Denmark, the more modern view includes Iceland and Finland. 10 ENCYCLOPEDIA BRITANNICA 498 (15th ed. 2002).

2. *See infra* Table 1 p. 438. Note that Finland's law was set to take effect in 2001. *See* Interview with Dr. Kees Waaldijk, Lecturer, Universiteit Leiden, The Netherlands (June 11, 2001) [hereinafter Waaldijk Interview]; International Lesbian and Gay Association, World Legal Survey (Denmark), *at* http://www.ilga.org/Information/legal_survey/Europe/denmark.htm (last modified June 23, 2000) [hereinafter Survey (Denmark)].

3. Survey (Denmark), *supra* note 2.

couples roughly equivalent to the rights of married heterosexual couples in those countries.[4] On April 1, 2001, the Netherlands took this movement one step further by opening up its actual marriage laws to same sex couples, thereby removing virtually all vestiges of legal second-class citizenship for lesbian and gay couples.[5]

As the United States begins to confront these legal changes, it is useful to examine the history and experience of Scandinavia[6] on these issues. This article examines the legal and cultural history of the rights of gay couples in Denmark, Iceland[7] and the Netherlands,[8] as a way of forming a framework to discuss the

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4. *Id.*

5. Act on the Opening Up of Marriage, 9 STAATSBLAD VAN HET KONINKRIJK DER NEDERLANDEN [Official Journal of the Kingdom of the Netherlands] (2001), *translated in* Text of Dutch Law on the Opening Up of Marriage for Same-Sex Partners (plus explanatory memorandum), *available at* http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html (May 2, 2001) (Kees Waaldijk trans.).

6. *See* Waaldijk, *Free Movement, supra* note 1. Other European countries, such as France, Hungary and Spain, have also adopted registered partnership laws. Scandinavia, however, was the leader in this area. Collectively, these countries share certain cultural similarities and public policies, making them useful to study in the evolution of gay couples' rights. *See also* Waaldijk, *Civil Developments, supra* note 1.

7. Denmark and Iceland were chosen as exemplars of the five modern Scandinavian countries for a number of reasons: Denmark was the first country to legalize registered partnerships and Iceland was the last Scandinavian country to finally address the entire cluster of gay couples' rights. The Danish Registered Partnership Act, D/341-H-ML, Act No. 372 (1989) (Den.), 1st Pioneers 1st Partners, http://users.cybercity.dk/~dko12530/s2.htm; Act on Recognized Partnership, Bill No. 564, 120th Legis. Assemb. (1996) (enacted) (Ice.), 1st Pioneers 1st Partners, http://users.cybercity.dk/~dko12530/s2.htm; Waaldijk, *Civil Developments, supra* note 1, at 80. The role of the state church in both Denmark and Iceland is insignificant as compared to that in Norway and Sweden, where church opposition has delayed and complicated the implementation of certain laws. *See* Rex Wockner, *Danes Make History: Gays Legally Marry, at* http://www.lysator.liu.se/~jmo/partnerskap/gays.legally.marry-wockner-1 (Oct. 1, 1989) [hereinafter Wockner, *Danes Make History*]; Rex Wockner, *How the Danes Did It: An Interview with LBL President Else Slange, at* http://www.lysator.liu.se/ ~jmo/partnerskap/ how.the.danes.did.it-wockner-2 (Oct. 1, 1989) [hereinafter Wockner, *How The Danes Did It*]. In other ways, Denmark and Iceland typify the rest of Scandinavia. Given the budgetary limitations of the author's travel grant, the author focused on these two Scandinavian countries. For the laws of the other three Scandinavian countries (Norway, Sweden and Finland), *see infra* Table 1 p. 438.

8. The Netherlands is included in this Scandinavian article because its public policy closely parallels its Scandinavian neighbors on so many issues, including gay rights. The Netherlands has, in fact, preceded its Scandinavian neighbors in introducing true gay marriage. *See* Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands–United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141 (2001).

potential U.S. legal changes for gay couples[9] and to consider the potential cultural and economic impact of the emergence of gay couples' rights in the United States.[10]

Part II individually explores the registered partnership legislation of Denmark, Iceland and the Netherlands by describing the impetus and development of gay and lesbian rights in each country. This section also discusses the advantages that the legislation provides to same-sex couples while simultaneously addressing its unresolved limitations. Part III analyzes the influence, or lack thereof, of registered partnership legislation on Scandinavian same-sex couples' ability to adopt children or gain access to assisted reproduction technology to create their own families. These results are compared with the experiences of same-sex couples in the United States.

Part IV summarizes outstanding issues affecting the continuation and evolution of gay and lesbian rights in Scandinavia and forecasts the future of registered partnership legislation. Part V suggests what may have influenced the legislative progress of gay and lesbian rights in the Scandinavian countries and how their successes may be used to guide the U.S. in adopting similar laws.

II. PARTNERSHIP RIGHTS

A. Denmark

On October 1, 1989, Denmark became the first country in the world to legally recognize same sex relationships through its Registered Partnership Act.[11] In 1984, the Danish Parliament organized a commission to study the legal, social and cultural situation of gays and lesbians. The Commission's goals included making recommendations to achieve both the removal of discrimination and the improvement of the conditions of

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9. *See generally,* Gay & Lesbian Advocates & Defenders, *A Historic Victory: Civil Unions for Same-Sex Couples What's Next!, at* http://www.glad.org/civilunions.html(last visited Jan. 23, 2002) [hereinafter *Historic Victory*]; Maxwell, *supra* note 8, at 142.

10. *See generally,* Maxwell, *supra* note 8; *Historic Victory, supra* note 9.

11. *See* Bent Hansen & Henning Jorgensen, *The Law Providing for Partnership for Gay Men and Lesbians in Denmark,* EUROLETTER, Nov. 19, 1991 (providing a political perspective to the ultimate passage of the Registered Partnership Act and an overview of the legal history of marriage in Denmark).

permanent cohabitation.[12] The Commission's final report was published in January 1988[13] and a bill creating registered partnerships was placed before Parliament in November of that year.[14] After extensive debate, the Registered Partnership Act was passed in June of 1989 and became effective on October 1, 1989.[15]

This law was the result of the general attitude that "homosexuals ought to be able to live and participate in society according to their identity"[16] and that "homosexual relationships are as much based on love and mutual respect as heterosexual relationships."[17] The stated purposes of the legislation, beyond the central goal of equalizing the social and legal status of gay and straight couples who wished to marry,[18] included easing the choices of young, gay people to live according to their feelings and needs.[19] In theory, the Act would reduce the number of short-term same-sex relationships in favor of committed and monogamous relationships while simultaneously decreasing the risk of contracting AIDS.[20]

Clearly these goals reflect a public policy favoring stable relationships, as well as both mental and physical health, over any

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12. *Id.* at 8–10; Linda Nielsen, *Family Rights and the Registered Partnership in Denmark*, 4 INT'L. J. L. & FAM. 297 (1990).

13. Nielsen, *supra* note 12, at 297–98. A provisional report published in February, 1986 resulted in some changes in the inheritance and gift tax laws. Michael Elmer & Marianne Lund Larsen, *Explanatory Article on the Legal Consequences, etc., of the Danish Law on Registered Partnerships*, 3 JURISTEN 1 (1990) (translated from original).

14. Nielsen, *supra* note 12, at 297–98.

15. *Id.* This Act applies only to same sex couples. *See* The Danish Registered Partnership Act, *supra* note 7. Cohabitating heterosexual couples may not register, though, of course they may marry. *See id.* This reflects a longstanding (and some argue outdated) philosophy in Danish law that marriage is the "best juridical frame for the family and the best security, socially, emotionally and economically, for individual family members." Matrimonial Law Reform Commission of 1969, quoted in Nielsen, *supra* note 12, at 300. Also, the Act did not apply to the territories of Denmark—the Faroe Islands and Greenland—as they were self-governed to some extent. International Lesbian and Gay Association, World Legal Survey (Faroe Islands), *available at* http://www.ilga.org/Information/legal_survey/Europe/faroe_islands.htm (last modified Nov. 29, 1999). Greenland later adopted the law in 1996. Steffen Jensen, Recognition of Gay and Lesbian Partnerships in Europe, *available at* http://www.steff.suite.dk/partner.htm (last visited Apr. 22, 2002).

16. Nielsen, *supra* note 12, at 297 (quoting and citing the commissions final report).

17. *Id.*

18. *Id.* at 298.

19. *Id.*

20. *Id.*

particular moral or religious platform on the broad issue of homosexuality. This approach can be viewed as pragmatic or as one favoring human rights over religious rights. The approach also reflects the public policy on homosexuality now prevalent throughout Scandinavia.[21]

Many scholars have asked why Denmark was the first to introduce the legal construct of a gay union.[22] Possible reasons include the following: Denmark has one of the oldest gay organizations in the world,[23] Denmark has some key differences in its family structures,[24] the Lutheran religious tradition is more open to "different kinds of thinking" than more traditional Christian approaches and, in general, the power of the state church is limited.[25] In short, the country epitomizes the liberal Scandinavian perspective that embraces human rights and is not particularly subject to religious antagonism.[26]

In addition, Denmark experienced changes in sex roles earlier than Europe or the United States due to an early massive influx of women in the work force.[27] Accordingly, the number of day care centers burgeoned while the number of heterosexual couples opting against marriage dramatically increased.[28] Some believe that the growing acceptance of unmarried heterosexual cohabitation encouraged a growing acceptance of other "non-traditional families," including cohabitating homosexuals.[29] Whatever the reason, it proved to be a lasting change and began a Scandinavian legal trend that today extends to a number of other European countries, including Hungary, Spain and France.[30]

The legal impact of the Danish Registered Partnership Act was to create the general rule that the registration of a same sex partnership carries the same legal consequences as heterosexual

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21. This is true even in Norway and Sweden, where the role of the church is stronger. Waaldijk Interview, *supra* note 2.

22. Wockner, *How The Danes Did It*, *supra* note 7.

23. Hansen & Jorgensen, *supra* note 11, at 2, 6, 12–14.

24. Interview with Dr. Wilhelm Fondrosen, Danish National Archives, (June 16, 2001) [hereinafter Fondrosen Interview].

25. Wockner, *How The Danes Did It*, *supra* note 7 (quoting Else Sange, then National President, LBL, the Danish National Association for Gays and Lesbians).

26. Hansen & Jorgensen, *supra* note 11, at 15.

27. Fondrosen Interview, *supra* note 24.

28. *Id.*

29. *Id.*

30. *See* International Lesbian and Gay Association, World Legal Survey, *at* http://www.ilga.org (last modified June 3, 2002) [hereinafter ILGA website].

marriage.[31] This rule treated registered partners equally as married couples under the Danish tax, pension,[32] life insurance[33] and social security laws.[34] It also created equivalent rules for mutual support obligations,[35] property rights[36] and succession of property upon the death of a partner or legal dissolution of the relationship.[37] Divorce itself, with its attendant obligations, was also extended to registered partners.[38]

To this general rule of legal equality between registered partners and married couples, there were a number of key exceptions itemized in the original Act.[39] These included a requirement that one partner be a Danish citizen living in Denmark,[40] an absence of any requirement that the state Lutheran church perform gay or lesbian marriage or partnership ceremonies,[41] and a prohibition against the adoption of children.[42]

In 1999, the stringent citizenship requirement was relaxed to a mere residency requirement, thus allowing registration for same

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31. Nancy Maxwell, Astrid A.M. Mattijssen & Charlene Smith, *Legal Protection for all the Children: Dutch-American Comparison of Lesbian & Gay Parent Adoptions*, 3.1 ELECTRONIC J. COMP. L. 13 ¶ 3.3 (Aug. 1999), *at* http://law.kub.nl/ejcl/31/art31-2.html.

32. *See* The Danish Registered Partnership Act, *supra* note 7. Only public pensions are covered by the Act. Private pensions are not legally required to treat survivors of registered partnerships the same as survivors of heterosexual marriages. Nielsen, *supra* note 12, at 304. *See also* Elmer & Larsen, *supra* note 13, §5.8.

33. Nielsen, *supra* note 12, at 304. The common beneficiary designation is "nearest relative." *Id.* at 303–04. The Act extends this to include a registered partner in the same way the phrase would normally entitle a spouse. The Danish Registered Partnership Act, *supra* note 7. *See also* Nielsen, *supra* note 12, at 304.

34. Nielsen, *supra* note 12, at 302.

35. *Id.* at 301. In Denmark, married individuals are legally obligated to contribute "to the procurement of a standard of living for both partners suitable to their conditions." *Id.* This can be a monetary contribution or work in the home, both of which are equally valued by the law. *Id.*

36. *Id.* Danish couples enjoy a form of community property rights. *Id.* Although each partner retains individual ownership (of both pre-marital property and property acquired during the marriage) during the marriage for the purposes of creditors and for disposing of property (with one exception—neither can sell the primary residence of the couple or its furniture), upon divorce or death all property (whenever acquired) is considered jointly owned. Couples, however, may contract otherwise. *Id.*

37. Nielsen, *supra* note 12, at 303.

38. *Id.* at 302.

39. *See* The Danish Registered Partnership Act, *supra* note 7. For example, § 4.2 states that the Danish Legal and Incapacity and Guardianship Act regarding spouses shall not apply to registered partners. *Id.*

40. Wockner, *Danes Make History*, *supra* note 7; Elmer & Larsen, *supra* note 13, §5.2 (addressing the citizenship requirement).

41. Elmer & Larsen, *supra* note 13, § 5.2.

42. *Id.*

sex partners who had lived in Denmark for two years.[43] Although gay and lesbian priests perform ceremonies voluntarily in Copenhagen and the church allows ritual blessings of partnerships, official church disapproval still exists.[44] In contrast, the gay community has seen some progress in the field of same sex adoption.[45]

B. Iceland

By Scandinavian standards, gay rights arrived late to Iceland,[46] due in part to a late start socially.[47] Privately, Icelandic gays and lesbians found acceptance within their families[48] because of the strong role of familial loyalty[49] coupled with a weak state church.[50] Publicly, however, acceptance of homosexuality really only began in the 1970's. In fact, before 1980, a derogatory slang was the only known Icelandic word to describe homosexuals.[51] In

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43. Steffen Jensen, *Adoption Rights to Danish Gay or Lesbian Couples-Partnership Law Changed, at* http://www.steff.suite.dk/eurolet.htm (May 1999). Also, the law was extended to citizens of Norway, Sweden and Iceland, since those countries have virtually identical registered partnership rights. *See* Interview with Soren Laursen, LBL, former Chairman, currently a member of the Board of Directors (June 14, 2001) [hereinafter Laursen Interview].

44. Laursen Interview, *supra* note 43.

45. *See infra*, Part III.A.

46. *See generally*, Waaldijk, *Civil Developments*, *supra* note 1, at 68, 70, 75. In 1811, the Netherlands became the first Scandinavian country to decriminalize homosexuality. This was a direct result of French control since France had decriminalized homosexuality in 1791. Two more countries followed suit many years later: Norway in 1902 and Denmark (which still included Iceland) in 1930. In 1981, Norway became the first country to introduce gay anti-discrimination legislation (workplace, housing, public services, etc.). Alternatively, in 1989, Denmark became the first country to recognize registered partnerships. *See infra* Table 1 p. 438. *See also* ILGA website, *supra* note 30; Waaldijk, *Civil Developments, supra* note 1, at 62; Interview with Dr. Thorvaldur Kristinsson, Chairman, Samtökin '78 (Icelandic National Association of Gays and Lesbians) (June 10, 2001) [hereinafter Kristinsson Interview].

47. *See generally*, Kristinsson Interview, *supra* note 46, at 11–12.

48. *See* Interview with Dr. Guotrun Ogmundsdottir 24, member of Icelandic Parliament, Althingi (June 11, 2001) [hereinafter Ogmundsdottir Interview].

49. *See* Ogmundsdottir Interview, *supra* note 48. The isolation created by Iceland's geography and climate created a family culture in which family members depended upon each other to work the family land or business. Families literally could not afford to cast out any members. Should an individual become an outcast, that individual would not survive long in such an economy. Kristinsson Interview, *supra* note 46; Ogmundsdottir Interview, *supra* note 48.

50. Kristinsson Interview, *supra* note 46, at 23.

51. *About Samtökin 78, at http://www.gayiceland.com* (last visited Feb. 28, 2002) [hereinafter *Samtökin 78* website].

1975, however, a Shakespearean actor became the first openly gay person in mainstream media and the first openly gay person in Iceland.[52] As a result, in 1978, thirteen brave gay men formed the first official gay organization named "Samtökin 78."[53]

In 1985, the first parliamentary proposition was put forth to investigate, recommend and improve the status of gay people in Iceland.[54] The proposition failed,[55] in part because the state monopoly on the media was not broken until 1986.[56]

The break up of the state television monopoly introduced a new generation of television and radio people who began to openly address gay issues in the media.[57] Thus, in 1992, a second, similar proposition was agreed upon.[58] The resulting commission reported its findings and recommendations in October 1994. Finally, in June 1996, the Parliament passed both an anti-discrimination statute and a Registered Partnership Act.[59] Thus, after a slow start, Iceland was shamed into catching up to its cultural brethren and it did so with a vengeance.[60] Iceland's Parliament has passed a plethora of laws, covering everything from workplace discrimination to adoption rights, over the past six years.[61]

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52. Thorvaldur Kristinsson, *Island: At ta sin plats*, 6(2–3) LAMBDA NORDICA 112, 115 (2000) [hereinafter, Kristinsson, *Island*].

53. *Id. See also* Kristinsson Interview, *supra* note 46. In 1987, the group won support from the City Council and could now rent a house, a far cry from previous meetings hosted in a basement. *Samtökin 78* website, *supra* note 51. In 1998, they bought their own community center with support (including financial) from the City Council. *Id.*

54. Kristinsson, *Island, supra* note 52, at 118.

55. *Id.*

56. *Id.*

57. Kristinsson Interview, *supra* note 46.

58. Kristinsson, *Island, supra* note 52, at 118–19. This ultimate breakthrough can be attributed to the efforts of the current mayor of Reykjavik, who was then a member of the Icelandic Parliament, the Althingi. Kristinsson Interview, *supra* note 46. This is a prime example of how local politics become national politics in Iceland—a phenomena which has alternately held back gay rights and, when the time was finally right locally, hurtled these rights forward by leaps and bounds. Kristinsson Interview, *supra* note 46.

59. Kristinsson, *Island, supra* note 52, at 119–20. (Translations of the actual laws can be found at the Icelandic Parliament's Information Office's website at www.althingi.is).

60. Kristinsson Interview, *supra* note 46. The Nordic Council of Parliamentarians is very influential. *Id.* The goal of this group, founded in the 1960's and becoming active in the 1970's, was to unite the Scandinavian countries on issues of public policy and consequent law. *Id.* Iceland was long criticized by this group for lagging behind other Scandinavian countries on the issue of gay rights. *Id.*; Ogmundsdottir Interview, *supra* note 48.

61. Kristinsson, *Island, supra* note 52, at 119–23. The first breakthrough was a law equalizing between straight and gay young people the age of consent (for sexual activity).

The Partnership Act granted registered gay and lesbian couples many legal rights and responsibilities similar to those vested in a heterosexual marriage.[62] These included tax and social security ramifications and parallel provisions for divorce and property succession upon a partner's death.[63] Like its Danish predecessor, the Icelandic law imposed a citizenship requirement, it did not require the state church to perform ceremonies,[64] and it did not permit adoption.[65]

In 2000, improvements were made to the Registered Partnership Act.[66] These improvements closely mirrored the amendments that Denmark had adopted to its own law in 1999.[67] Under the new law, the citizenship requirement was eliminated in favor of a one-year residency requirement[68] and step adoption was allowed in addition to step custody.[69] Church ceremonies are still not required but, because the church is not particularly powerful in Iceland, its reluctance to embrace gay relationships has not been a major concern.[70]

C. Netherlands

Despite the Netherlands' liberal civil rights reputation and Amsterdam's reputation as the city of legal prostitution and deviant sex,[71] the Netherlands was the penultimate Scandinavian country to legalize gay and lesbian registered partnerships. It did

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Id. In 1992, the age of consent changed from 18 for gay youths and 16 for straight teenagers to a uniform 14 for all. *See id.* at 118–19. This was really a result of the AIDS scare. Kristinsson Interview, *supra* note 46. The increasing public view was that education and visibility might lead to prevention. Thus, 1987 witnessed the first attempts to legally recognize and to acknowledge gay sexual activity, particularly among young people. *Id.*

62. Kristinsson, *Island, supra* note 52.

63. *Id.*

64. *See* Kristinsson Interview, *supra* note 46, at 21. The state church (Lutheran) officially denied the right to gay couples in 1996, but because the leaders of the church are split, the practical rule is that gay partnership ceremonies cannot be performed in church unless the individual minister agrees to it. *Id.* If this occurs, the church will not prevent the ceremony. *Id.*

65. Kristinsson, *Island, supra* note 52, at 120–23; Kristinsson Interview, *supra* note 46.

66. Kristinsson, *Island, supra* note 52, at 120–22.

67. Kristinsson Interview, *supra* note 46.

68. *See supra*, Part II.B.

69. Kristinsson, *Island, supra* note 52, at 120–23; Kristinsson Interview, *supra* note 46.

70. Kristinsson Interview, *supra* note 46.

71. *See, e.g.*, TIME OUT GUIDE TO AMSTERDAM 211 (6th ed., Penguin Books 2000).

so in 1998, followed only by Finland.[72] There are a variety of suggested explanations for its slow acceptance.[73] Once the Dutch undertook to address the civil rights of gay couples, however, they did so more thoroughly than any other country in the world. Effective April 1, 2001, Dutch gay and lesbian couples may do more than merely register their partnership—they may actually marry under the same exact laws and provisions as heterosexual Dutch couples.[74] The Netherlands is the first and only country in the world to allow a true gay marriage.[75]

Insofar as the Scandinavian countries have retained different rules for straight and gay couples, the Netherlands has only differentiated with regards to stranger adoption of foreign children.[76] While same sex Dutch couples wishing to marry are subject to a residency requirement, so too are heterosexual couples wishing to marry.[77] In both cases, one partner must have an "established domicile" or "habitual residence" in the Netherlands.[78] Yet, there is no precise minimum time period specified in the statute.[79]

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72. Denmark 1989; Norway 1993; Sweden 1995; Iceland 1996; Finland 2001. ILGA website, *supra* note 46; Waaldijk, *Civil Developments*, *supra* note 1, at 79–85. Additionally, the Netherlands was first Scandinavian country to offer registered partnerships to heterosexual couples as well as gay couples (France has since done the same)—a clear reflection of the focus on individual rights and choices. *See* Maxwell, *supra* note 8, at 151–52.

73. Among the most plausible are the notions that the Netherlands has a slower legislative machine than other countries. Maxwell, *supra* note 8, at 34. The Dutch gay rights movement focused its efforts on individual rights (such as job discrimination) as opposed to couples' rights. Waalddijk Interview, *supra* note 2. *See also* Maxwell, *supra* note 8, at 34–5. For example, in 1971 the age of consent was equalized; in 1983, a general anti-discrimination law was introduced and in 1992, another law was enacted making such discrimination a criminal offense. *See* Waaldijk, *Civil Developments*, *supra* note 1, at 75–9. The Netherlands was also slow to change because Dutch law requires one spouse to support the other in the event of unemployment. This is an economic disincentive for same-sex marriages. Wockner, *How The Danes Did It*, *supra* note 7.

74. *See* Kees Waaldijk, *Text of Dutch law on the opening up of marriage for same-sex partners*, *at* http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html. (last visited May 23, 2002)[hereinafter Waaldijk, *English translation*]. *See also* Kees Waaldijk, *Latest news about same-sex marriage (and what it implies for foreigners)*, *at* http://ruljis.leidenuniv.nl/user/ cwaaldij/www/NHR/news.htm. (last visited May 23, 2002) [hereinafter, Waaldijk, *Same-sex Marriage*]

75. Waaldijk, *Same-sex Marriage*, *supra* note 74.

76. *See infra*, Part III.C.

77. Waaldijk, *Same-sex Marriage*, *supra* note 74.

78. Waaldijk, *English translation*, *supra* note 74.

79. *Id.*

Since the Netherlands does not have a state church, the state is unable to legislate a requirement authorizing any church to perform marriage ceremonies.[80] Although in practice most churches will marry heterosexual couples and many will refuse to marry homosexual couples, this is a reflection of the individual church's choice, and not a matter of law.[81]

III. PARTNERS' RIGHTS TO CHILDREN: ADOPTION AND ASSISTED REPRODUCTION

A. Denmark

Married heterosexual couples in Denmark may either jointly adopt a child ("stranger adoption") or one spouse may adopt the natural child of the other spouse ("stepchild adoption").[82] In contrast, the original Registered Partnership Act prohibited both stranger adoption by registered partners,[83] as well as stepchild adoption of a partner's natural child.[84] This latter prohibition existed even where the partner was the natural parent with custody of the child.[85] Also, even common custody (without adoption by the step parent) of a stepchild was impossible.[86] Furthermore, while cohabitating married heterosexual couples have joint custody of any child the woman bears during marriage, lesbian registered partnerships do not share this presumptive right.[87]

Denmark continues to prohibit stranger adoption for registered partners, but as of July 1, 1999, has allowed step

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80. Waaldijk Interview, *supra* note 2.

81. *Id.*

82. Nielsen, *supra* note 12, at 305.

83. *Id.* A common reason given for the prohibition on gay stranger adoption is a fear that allowing it might deter other countries from sending children to Denmark for adoption. Since there is an acute shortage of domestic children available for adoption, this fear is likely well founded. *Id. See also* Laursen Interview, *supra* note 43.

84. Nielsen, *supra* note 12, at 305.

85. Elmer & Larsen, *supra* note 13, § 5.3.

86. Nielsen, *supra* note 12, at 304–05. A child of a divorced (or unmarried) couple has a right to support from its father equal to that of a legitimate child; however, custody generally belongs to the mother. *Id.* at 305. This custody can be transferred to the mother and her subsequent husband, if the natural father agrees. *Id.* Registered partners cannot achieve the same custody transfer of stepchildren, even if the non-partner parent dies. *Id.*

87. Waaldijk, *English translation, supra* note 74. *See also* Nielsen, *supra* note 12, at 305.

adoption and common custody of a stepchild.[88] Stranger adoption remains an issue due to Denmark's heavy reliance on foreign children for adoption.[89] This reliance creates intense competition for the small pool of available domestic children and engenders a fear that legalizing gay adoption will create a boycott by foreign suppliers, further limiting the number of available children.[90]

Danish registered partners also are not treated equally with married couples in the area of assisted reproduction.[91] A lesbian partner may naturally conceive and bear a child through private arrangements and be legally recognized as the child's mother.[92] Under the 1999 law, her partner may then adopt the child with the consent of the natural father.[93] The same cannot be achieved, however, through artificial insemination—at least not legally.[94]

In 1989, when the original Registered Partnership Act was passed, legal regulation of artificial procreation did not exist.[95] Hospitals, however, commonly offered such services to married couples while denying services to lesbians and other unmarried women.[96] Unmarried women could, however, obtain artificial insemination from non-governmental organizations.[97]

The 1999 amendments to the Registered Partnership Act did not improve the situation for lesbian women.[98] Indeed, the unregulated practice of excluding lesbians was actually formalized into law in May of 2001 when the Danish parliament passed

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88. Jenson, *supra* note 43 at 1. This is true as long as the stepchild was not earlier adopted from a foreign country. *Id.*

89. Laursen Interview, *supra* note 43.

90. *See supra* discussion at Part II.B; Nielsen, *supra* note 12, at 305; Laursen Interview, *supra* note 43.

91. Soren Laursen, *Politicians Fight Lesbians—But the State Fights Back*, PAN GUIDE TO GAY & LESBIAN DENMARK 2000, *at* http://www.lbl.dk/english/ (last visited Jan. 23, 2002) [hereinafter Laursen, *Politicians Fight Lesbians*].

92. *Id.*

93. Jensen, *supra* note 43, at 1.

94. Laursen, *Politicians Fight Lesbians*, *supra* note 91.

95. Nielsen, *supra* note 12, at 305. Artificial procreation refers largely to artificial insemination because in vitro fertilization and egg donation were not widely practiced at the time. *Id.*

96. *Id.*

97. *Id.* Health care is nationalized in Denmark (so there is no issue about private health insurance covering these procedures), but there are some private clinics available for those who can afford to pay. *Id.*

98. Jensen, *supra* note 43.

legislation banning assisted fertilization for lesbians.[99] Thus, effective October 1, 2001, the law forbids public hospitals and private medical clinics from providing assisted fertilization for lesbians, although unmarried, cohabitating, heterosexual women have this right.[100] In an ironic twist, because the law only applies to medical settings, a lesbian midwife opened a private facility for lesbian inseminations.[101] While this article was being written, the first parliamentary attempts to amend the law to shut down this clinic failed, but further efforts are expected in the next session of Parliament.[102]

B. Iceland

The original registered partnership law in Iceland, like its Danish counterpart, prohibited both stranger and step adoption. Icelandic law, however, gave same sex partners the right to common custody of children brought into the partnership ("stepchildren").[103] Iceland thus went from being one of the last Scandinavian countries to legalize gay unions,[104] to the first country in the world to permit joint custody of the natural children of one gay partner.[105] This move actually set the stage for the legalization of step adoption throughout Scandinavia.[106]

In May 2000, the Althingi passed legislation amending the original partnership act to permit step adoption.[107] This amendment closely paralleled the Danish amendment of 1999, making Icelandic and Danish law identical on the issues of stepchildren (permitting both step custody and step adoption) and on the issue of stranger adoption, where the prohibition continues.[108]

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99. Soren Laursen, *Danish Parliament Bans Assisted Fertilization for Lesbians, at* http://www.brentpayton.com/abroad/Danish%20Parliament%20Bans%20Assisted%20Fertilization%20for%20Lesbians.txt (last visited May 23, 2002).

100. *Id.*

101. Laursen, *Politicians Fight Lesbians*, *supra* note 91.

102. Laursen Interview, *supra* note 43.

103. Kristinsson, *Island, supra* note 52, at 120–23.

104. Waaldijk, *Civil Developments*, *supra* note 1, at 80. Ironically, Iceland even beat out the Netherlands. *Id.*

105. Kristinsson Interview, *supra* note 46.

106. *Id.*

107. The International Lesbian & Gay Association, at http://www.ilga.org (last updated Feb. 11, 2001).

108. *See* ILGA website (Denmark), *supra* note 30. In Norway and Finland, there can be step custody but neither step adoption nor stranger adoptions are permitted. In

In Denmark and throughout Scandinavia, stranger adoption by gay couples is a thorny issue because of the virtually non-existent pool of domestic children to adopt.[109] The limited pool derives partly from a long history of liberal abortion law and policy.[110] Abortion has been acceptable and common for so long that women with unwanted pregnancies tend to abort rather than to give birth and put the child up for adoption.[111] In addition, because children borne out of wedlock are both common and acceptable, there is little impetus for unwed mothers to surrender their children for adoption.[112]

Iceland—like its Scandinavian neighbors—has been hesitant to permit stranger adoption by gay couples because so many of the foreign children who enter the country for adoption come from countries that oppose homosexuality. There is an underlying fear that this would raise competition for an already small pool of domestic children. In addition, a boycott by disapproving foreign countries would further limit the number of children available to heterosexual couples.[113]

Access to artificial insemination is denied to lesbian couples in Iceland much as it is in Denmark.[114] Iceland, also, has a state run health care system that legislates services to various groups.[115] While no law explicitly prohibits lesbian access (as in Denmark), no law guarantees this access either and the current practice is to exclude lesbians from these medical services.[116] The rationale for this exclusion is unclear as it does not implicate the same issues as adoption.[117] There is no apparent shortage of sperm (or egg) donors and the procedures are no longer prohibitively expensive.[118] Yet, there remains a resistance to assisting lesbians in the creation of new children despite the fact that if they can achieve a pregnancy unassisted by the government (either before

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Sweden, registered partners can neither adopt nor share joint custody. Sweden has recently completed a study of children in homosexual households and the study favorably concludes that custody and adoption should be granted. *Id.*

109. Kristinsson Interview, *supra* note 46.
110. *Id.* at 15.
111. *Id.*
112. Ogmundsdottir Interview, *supra* note 48.
113. Kristinsson Interview, *supra* note 46; Ogmundsdottir Interview, *supra* note 48.
114. Kristinsson Interview, *supra* note 46.
115. *Id.* at 19.
116. *Id.*
117. *See id.* (This is the general proposition of the article).
118. *See id.* at 18.

or during their lesbian partnership), both the birth mother and her lesbian partner are legally entitled to custody of the child.[119]

C. Netherlands

The Netherlands has more liberal adoption laws for gay and lesbian couples than do any of the Scandinavian countries.[120] Not only are step adoption and step custody (referred to as "authority") allowed, but custody of children born to a married lesbian couple rests automatically with both partners, not just the birth mother.[121] Even more remarkably, the Netherlands also permits stranger adoption of domestic children.[122] The laws only prohibit adoption by gay couples of foreign children.[123] The reason for this is the same as that proffered for the more general prohibition of stranger adoption in Denmark and Iceland: foreign countries would not provide children to be adopted if they thought that the children would go to gay couples.[124] In fact, research and studies conducted by the Netherlands supported the boycott argument.[125]

There is no Dutch law restricting access to medically assisted reproduction.[126] As in Iceland, this is a matter of hospital discretion, despite a government-run health system.[127] Unlike Icelandic facilities, however, Dutch medical facilities generally do

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119. *Id.* at 14.

120. *See* ILGA website, *supra* note 30. Sweden is considering opening up stranger adoptions of domestic children to same sex couples. *Id.* The Swedish parliament has concluded favorably (though not yet acted) on this issue. Social Democrats control the government in Sweden and hold approximately 459 seats in Parliament. *Id.* As such, the Swedish government will likely support gay and lesbian interests. *Id.* A translated copy of the report of The Commission on the Situation of Children in Homosexual Families can be obtained from Eva-Charlotte Salvall, Secretary of the Commission, *at* http://eva-charlotte.salvall @dv.dom.se. Kristinsson Interview, *supra* note 46; Waaldijk Interview, *supra* note 2.

121. Waaldjik, *Same-sex Marriage, supra* note 74.

122. *See* Waaldijk, *English translation, supra note 74. See also* Waaldijk Interview, *supra* note 2. As a practical matter, this law is largely of symbolic value since stranger adoption of domestic children is so rare. *See id.*

123. Waaldjik, *Same-sex Marriage, supra* note 74.

124. *Id. See* Waaldijk Interview, *supra* note 2.

125. *See* Waaldijk, *English translation, supra* note 74.

126. Waaldijk, *Same-sex Marriage, supra* note 74.

127. *Id.*

not exclude lesbians or unmarried women from having access to these services.[128]

It may be surprising from a U.S. perspective that Scandinavia would be so seemingly liberal on the issue of legalizing gay relationships and yet so restrictive on the issue of adoption and assisted conception. In the United States, Vermont is the only state to have fully legalized gay and lesbian relationships.[129] Many other states, however, permit gay couples to adopt and have children through artificial methods.[130] This difference may reflect the combination of a lower level of American acceptance of the legitimacy of gay unions coupled with a different situation regarding adoption and health care.

In the adoption arena, the United States has a shortage of foster and adoptive parents for domestic children, particularly for minority children, older children and those with physical and emotional difficulties.[131] Many states therefore have been more involved with placing these children than looking towards a foreign supply of children—usually available only to the wealthy through private adoption services.[132] Also, unlike in Scandinavia, health care and hence, assisted reproductive procedures, are funded by the individual, not the United States government.[133] Whatever the reason, this dichotomy represents a legal pattern that exists throughout Scandinavia and, as to adoption of foreign children, even in the Netherlands.

IV. REMAINING SCANDINAVIAN CHALLENGES

The Scandinavian countries share four areas where further legal and cultural change appears necessary to truly achieve equal rights for gay and lesbian couples:[134] official church sanctioning of

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128. *See* Waaldijk, *English translation*, *supra* note 74. *See also* Waaldijk Interview, *supra* note 2.

129. Legal Marriage Court Cases—A Timeline, at www.buddybuddy.com/t-line-1.html (last visited May 23, 2002); *Historic Victory*, *supra* note 9.

130. Nancy G. Maxwell, Astrid A. M. Mattijssen & Charlene Smith, *Legal Protection for all the Children: Dutch-American Comparison of Lesbian and Gay Parent Adoptions*, 3(1) ELECTRONIC J. COMP. L. 8 (1999). *See also,* Gay and Lesbian Advocate Defenders (GLAD), at http://www.glad.org (summarizing adoption and artificial conception methods available for gay couples)[hereinafter GLAD website](last visited May 17, 2002).

131. Maxwell, Mattijssen, & Smith, *supra* note 130, at 8.

132. *See id.* at 8.

133. *Id.* at 9.

134. *See* Waaldijk Interview, *supra* note 2.

registered partnerships,[135] permitting gay and lesbian couples to participate in stranger adoption,[136] requiring access to assisted reproduction opportunities for lesbian women,[137] and achieving recognition of the Scandinavian registered partnerships elsewhere in the world.

Breakthroughs in the area of same-sex marriage are likely to come with time. Statistics are now available that demonstrate that these relationships are common, as stable as heterosexual marriages and often contain children. For example, Denmark now has over a decade of experience with legalized same sex partnerships.[138] Sweden has just completed a study of the children of homosexual relationships.[139]

Data of this sort are likely to help develop a comfort level with both the morality of registered partnerships and the health of children raised in these relationships. It has been theorized that cultures evolve to tolerance and eventual acceptance of homosexual relationships through a series of cultural and legal steps.[140] To the extent that this is true, it appears that Scandinavia will continue to evolve in the area of gay couples' rights, leading the way for the rest of the world, at least as to the first three outstanding challenges of church sanctioning, stranger adoption, and assisted reproduction.[141]

Scandinavia has little control over the issue of reciprocity.[142] Although the Scandinavian countries have agreed among themselves to honor each other's registered partnerships,[143] these relationships are not legally recognized elsewhere in the world.[144] Nonetheless, the Scandinavian countries are actively lobbying other European countries, and the European Union as a whole, to

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135. *Id.*
136. *Id.*
137. *Id.*
138. Waaldijk, *Civil Developments*, *supra* note 1, at 80.
139. *See* Nielsen, *supra* note 12, at 305.
140. *See* Waaldijk, *Civil Developments*, *supra* note 1, at 67–88.
141. *See id.*
142. Waaldijk, *Free Movement*, *supra* note 1, at 277.
143. *Id.* Note that Finland has yet to sign on to this having only recently adopted a registered partnership act. *Id.* at 272.
144. *Id.* France, Hungary and Spain offer some form of reciprocity but this is limited to rights under their respective laws (not the law of the couple's home country). *See* Waaldijk Interview, *supra* note 2. In June 2001, the EU conducted a conference to address this issue as one of free trade and movement that needs to be addressed uniformly by all EU members. *See Id.*

honor registered partnerships in the name of free trade and free movement throughout Europe.[145] The United States would do well to watch carefully as she begins to face the same dilemma. For example, Vermont civil unions are not currently recognized by any other state, but should any of the current efforts to pass similar legislation in other states prove successful,[146] it may follow that these laws begin to include reciprocity clauses.

V. CONCLUSION: IMPLICATIONS FOR LEGAL, CULTURAL AND ECONOMIC CHANGES IN THE UNITED STATES

This article begins to set a framework for considering both the legal and cultural implications of recognizing same sex relationships in the United States. One clue from Scandinavia is the balancing of legal and human rights against religious traditions.[147] Although the Christian churches of Scandinavia were opposed to homosexual relationships, the citizens were able to distinguish between the religious joining of two people in marriage and the legal rights that only heterosexual couples enjoyed.[148] When viewed as an issue of basic human fairness, the concept of granting legal rights to same sex couples gained broad public support.[149] When Americans can make a similar distinction, the United States will see the law changing. The Scandinavians have a long history of tolerance, perhaps borne out of a tradition of being traders who dealt with many different cultures through commerce and shipping. Similarly, states with a history of tolerance will also likely be among the first to legalize same sex relationships.[150]

This article also considers the likely business changes that the United States faces in the area of gay couples' rights. Assuming that the United States, like Scandinavia and Europe, will move toward legalization of same sex partnerships, Scandinavian experience tells us that the concomitant results to the business

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145. *See* Waaldijk, *Civil Developments*, *supra* note 1, at 1.

146. *See* GLAD website, supra note 130 (providing examples of states currently considering such legislation, e.g. Massachusetts).

147. William N. Eskridge, Jr., Experimental Quasi-marriage Laws Could Make Marriage Obsolete, *at* http://www.cnn.com/2000/LAW/07/columns/fl.eskridge.samesex.07.11/ (July 11, 2000).

148. Kristinsson Interview, *supra* note 46; Ogmundsdottr Interview, *supra* note 48; Waaldijk Interview, *supra* note 2.

149. Ogmundsdottr Interview, *supra* note 48.

150. *See* Waaldijk, *Civil Developments*, *supra* note 1, at 1.

community will be largely positive. Registering gay relationships publicly identifies new markets for all couple-oriented goods and services, beyond the obvious expansion of the market for wedding-related goods and services. Of course, business in the United States must contend with the potential health insurance costs of gay and lesbian spouses of employees due to the private health system.[151] Still, these costs are really just a realignment because most gay and lesbian couples consist of two working adults, each of whom is currently separately covered by their own employer.[152]

The preliminary question, of course, is how and when the United States will legally recognize same sex relationships. As we are already experiencing, this is likely to happen on a state-by-state basis. The small size of the Scandinavian countries made it easier to build consensus and to affect relatively rapid political and legal change.[153] The same is likely to be true in the United States so that smaller states may be the first to evolve legally.

Moreover, the Scandinavian experience has taught that a series of steps are required for a culture to evolve to a point of acceptance of homosexual relationships, beginning with decriminalization of homosexuality and its associated sexual acts.[154] Many U.S. states still have such criminal laws on their books and the Supreme Court has held that these laws are constitutional.[155]

By contrast, Scandinavia decriminalized homosexuality long ago and has since moved through a series of legal and cultural steps before comfortably arriving at legalized same sex partnerships.[156] These steps include equalizing the age of consent at which young straight and gay people may legally have sex, and introducing anti-discrimination legislation regarding the workplace, as well as in public and private services.[157] It may be that the United States must follow, state by state, a similar pattern.

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151. Marianne DelPo Kulow, *Same Sex Marriages: How Will They Impact Employers?*, 3 J. EMP. DISCRIMINATION L. 93, 94 (2001).

152. *Id.*

153. Cynthia J. Sgalla McClure, *A Case for Same-Sex Marriage: A Look at Changes Around the Globe and in the United States, Including* Baker v. Vermont, 29 CAP. U. L. REV. 783, 804 (2002) (stating that Denmark was the first nation to enact the Registered Partnership Act in 1989).

154. Waaldijk, *Civil Developments*, *supra* note 1, at 66–74.

155. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

156. See *infra* Table 1 p. 438.

157. *See* Waaldijk, *Civil Developments*, *supra* note 1, at 75–81.

This evolution allows for local cultures to adapt gradually, rather than moving directly from a public policy of labeling gay people as criminals to a policy of total acceptance and equal treatment.[158]

As in Scandinavia and the Netherlands, U.S. citizens probably need to realize for themselves, through direct experience, that society does not crumble when we acknowledge the existence of stable gay and lesbian relationships. As we begin to see same sex couples and their children as healthy families functioning well in our communities, rather than as criminals and moral deviants, we will likely replace emotional reactions of fear and moral judgment with more rational acceptance. Clearly some states are more legally evolved, and thus more culturally ready than others to legalize same sex partnerships. Whichever states lead the pack, the Scandinavian experience tells us that the progression toward a post-modern society compels us, step by step, toward the legal recognition of same sex relationships.

Table 1

Legal progression of gay rights in Scandinavia and the Netherlands

	Decriminalized homosexuality	Equalized age of consent	Anti-discrim. Legislation	Registered Partnership legalized	Same sex marriage legalized
Denmark	1930	1976	1987	1989	N/A
Iceland	1930	1992	1996	1996	N/A
Norway	1902	1972	1981	1993	N/A
Sweden	1944	1978	1987	1995	N/A
Finland	1971	1998	1995	2001 (pending)	N/A
Netherlands	1811	1971	1992	1998	2001

158. *See id.* at 86.