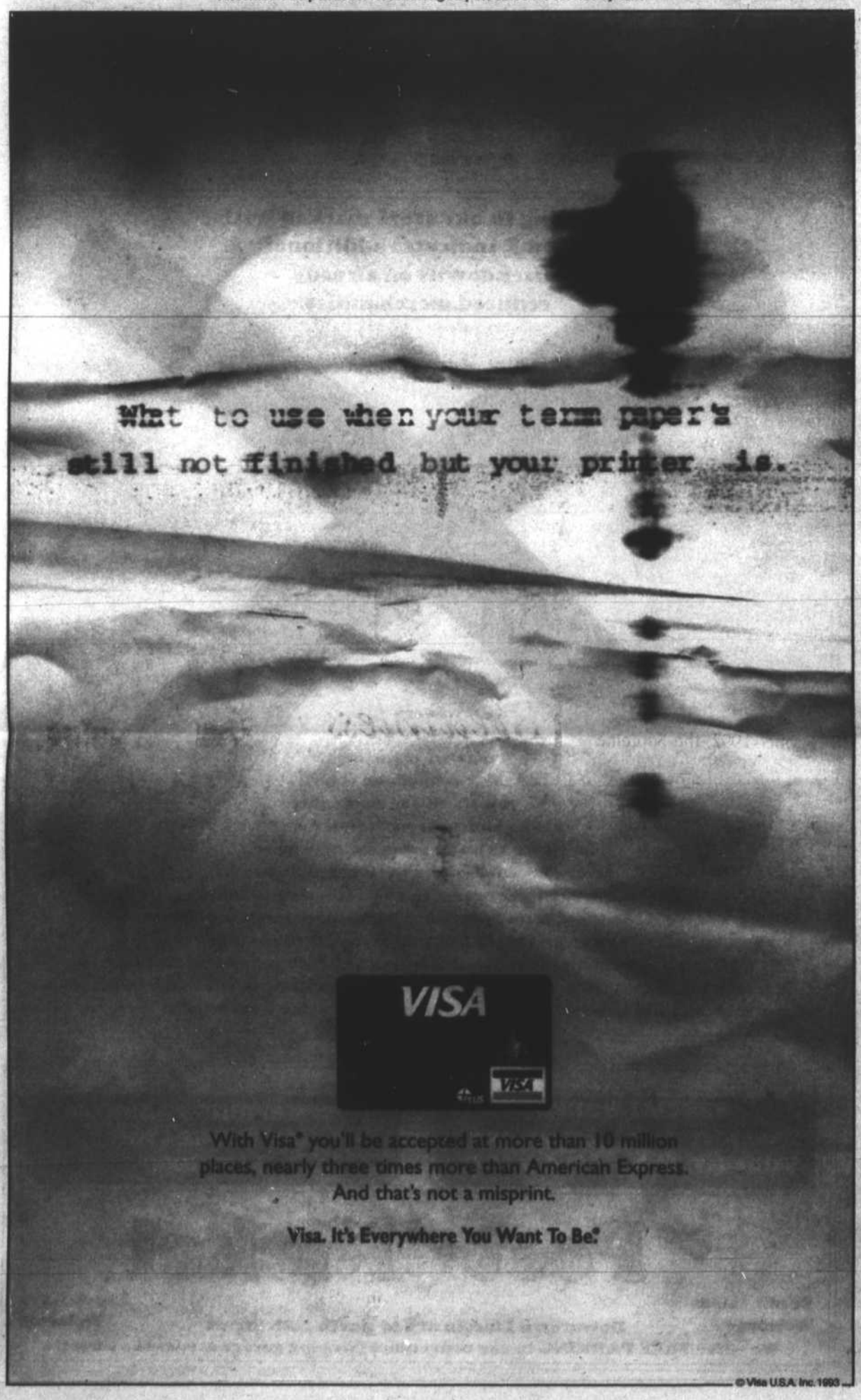

Michelle Paulman/DN

Suzanne Rogers-Lipsey, president of the Lincoln chapter of the National Organization for Women, argues with anti-abortion activist Christ Strode of Lincoln during a recent confrontation.

Root verdicts turn stale

Abortion.

It's the one issue today guaranteed to start a high-decibel argument and maybe even a fistfight if it's in front of a women's health center. It's the one issue where there seems to be little, if any, common ground between the two extreme opposing sides.

The genesis of the abortion debate goes back further than Roe vs. Wade — much further. In 1890, future Supreme Court Justice Louis Brandeis co-authored an article in the Harvard Law Review setting forth a then-theoretical "right of privacy." The right, as originally conceived, applied only to photographic representations of images.

Three-quarters of a century later, the Supreme Court heard Griswold v. Connecticut. The state of Connecticut had a statute on the books outlawing the sale of contraceptives to married couples. In this day and age, it sounds odd, but when the law was passed in the 19th century, Victorian morality reigned supreme.

The court struck down the law, and in the process created a new constitutional right — that of "privacy." Justice William O. Douglas found the new right not in the actual text of the Constitution, but rather in the "penumbras" of the First, Third, Fourth, Fifth, Ninth, and 14th Amendments. Just what "penumbras" were was never defined. The court carried its reasoning over to the sale of contraceptives to non-married couples in Eisenstadt v. Baird in 1972.

Roe v. Wade grew out of a Texas law that outlawed abortions. Norma McCorvey, a young unmarried woman, became pregnant and wanted an abortion. McCorvey claimed she had been raped; years later, she recanted and admitted no rape was involved.

The Supreme Court originally heard the case in 1970, but ordered rehearings a year later. Finally, in January 1973, the court issued its opinion.

The "right of privacy" allowed a woman to obtain an abortion, but the court placed restrictions on it by adopting the trimester approach. In the first trimester, the decision to abort is left solely to the woman and her physician. In the second trimester, the state may regulate the procedure due to concerns over the health of the mother. In the third trimester, the state may limit the right, or even prohibit it entirely, to protect the "potentiality of human life." The beginning of the third trimester, placed at 26 weeks, was termed the point of "viability," where the fetus could survive outside the womb.

Almost as soon as it wrote the opinion, the court began backing away from it. It first did away with any strict numerical definition of "viability." The court then outlawed public funding for abortions.

In a 1983 ruling, Justice Sandra Day O'Connor proposed substituting a new test for determining whether abortion restrictions were constitutional. O'Connor stated, in a dissent, that the trimester approach was "on a collision course with itself." Due to advances in technology, the point where the state needed to regulate the procedure was occurring close to birth, and the point of viability was moving further towards conception. O'Connor proposed an "unduly burdensome test," which would ask whether a proposed regulation imposed a severe obstacle or limitation on access to abortions.

The court finally adopted the "unduly burdensome" test, the Casey decision last year, but also explicitly upheld Roe. The court now has before it a request to overturn a Louisiana law which outlaws abortions; it allowed a lower court's invalidation of a similar Guam statute last year.

In the past week, two cases have thrown some twists on the basis for the "right" to abortion. A Tennessee couple, who had frozen seven embryos for later implantation, took a custody battle over control of the embryos to the Supreme Court. The wife wanted to bear the children; the husband wanted them destroyed, apparently fearing child-support payments. The justices ruled that the husband had a right to prevent his wife from bearing the children.

What's interesting about this is that the court has previously struck down laws that require women to notify their husbands that they are getting an abortion. However, if a husband can now prevent the beginning of a pregnancy, it should follow that he has some interest in its termination.

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