

# We don't have kings in Texas

■ State arrogance grieves relatives of body donors

By MARTIN J. SIEGEL

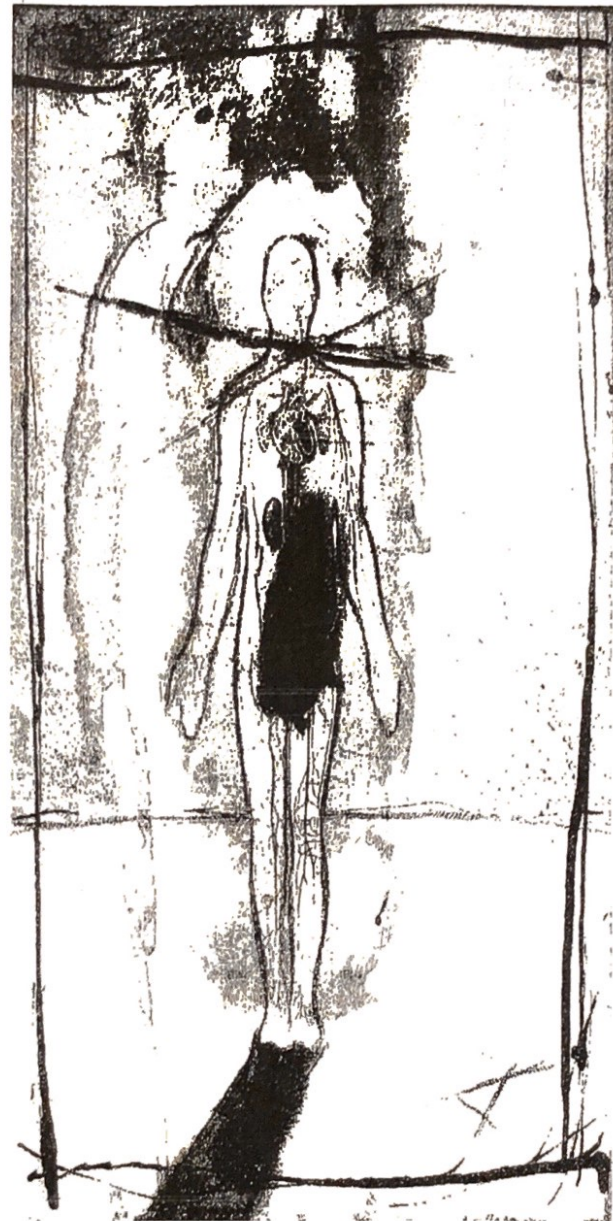
TEXANS have a healthy disdain for government. Our governor has relatively little power and our legislators are part-time. We are next to last in tax revenue raised and total general expenditures. So maybe you'd think Texans would be all the more hostile toward government when it grossly injures its own citizens. You would be wrong.

Imagine your Dad decided to donate his or her body to science, so that medical students could learn to heal the sick. After the educational use concluded, you would receive his cremated remains, so you could arrange a final resting place. Then imagine the state medical school that accepted the body mixed and lost his remains preventing your family from being able to say goodbye or have a gravesite to visit. Worse, imagine the reason the remains can never be returned is that the state employee running the program was selling body parts to out-of-state buyers for personal enrichment.

Actually, all this happened recently at the University of Texas Medical Branch at Galveston. I represent numerous affected families. Calling it a truly regrettable situation in a press release, UTMB admitted that the remains of approximately 70 donors would never be returned to their families, and that its own unforgivable failure of oversight caused the fiasco. If UTMB were a private mortuary, it would be legally liable to provide information to the dozens of families it harmed and reasonably compensate them. Since it is an arm of the state of Texas, however, it gets a free pass.

The reason is because of a long outdated legal doctrine called sovereign immunity. Sovereign immunity dates from the Middle Ages, when the king of England had no equal and could not be sued by subjects brave enough to try. As the great legal scholar Blackstone recorded, the king is not only incapable of doing wrong, but even thinking wrong; he can never mean to do an improper thing. In America, the king's infallibility ended in 1776, but the sovereign immunity of our state and federal governments, inherited from England, lingered on until modern times.

Today, however, most states and the federal government



have largely abandoned the doctrine and permit their citizens to sue government agencies and employees with only limited exceptions. For example, the North Dakota Supreme Court abolished sovereign immunity in 1994,

they happen to cause personal injury by using what the law calls tangible personal property, meaning a physical object. Thus, a doctor at a state hospital who amputates a patient's healthy leg can be sued because he used surgical

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observing that few legal rules have been so uniformly and soundly criticized.

But Texas is different. Based on a state law enacted in 1969, Texans can only sue state employees or agencies when

implements. But if the same doctor causes the same injury to the same patient by misreading a medical chart and failing to treat the patient's diseased leg, the doctor and hospital are legally immune.

For years, the Texas Supreme Court has virtually begged the Legislature to end this arbitrary and unjust distinction responsible for depriving thousands of Texans of even the possibility of justice. In 2001, Justice Nathan Hecht did so again, candidly acknowledging in an opinion, it is simply impossible for the courts to meaningfully construe and consistently apply the use-of-property standard. But the Legislature has not responded, and previously unaware citizens continue to be told incredulously that their government, like the king, can do no wrong.

In the UTMB cases, where the medical school was contractually bound to return cremated remains, an equally nonsensical rule deprived family members of legal redress: When the state has breached a contract, affected citizens or businesses can have their case heard by an administrative board if their injury is monetary, but if their loss consists of obvious emotional distress, no court or board will hear their claim.

All citizens left stranded by these irrational dividing lines can do is ask the Legislature to pass a specific resolution that applies only to their case and gives them permission to sue. But getting the Legislature to pass a law is well beyond the ability of most people. They can't hire high-priced lobbyists, the legislative session is short and lawmakers are rightfully focused on larger tasks, so sue-the-state resolutions almost never pass. In our case, many state senators and representatives were moved to help, and the Senate passed a resolution permitting suit against UTMB, but it died in a House committee.

Legal immunity inevitably breeds unaccountability and contempt by officials for the people they are supposed to serve. We no longer have a king, and no one else should be above the law either.

Immunity also breeds secrecy. Lawsuits are sometimes the only way to pry information from a company or state agency that would rather sweep something embarrassing under the rug. Because of UTMB's legal immunity, families who tried to help the medical school through their donations will never know what happened to the remains of their loved ones. The Legislature should end the rule that the king can do no wrong and give all Texans injured by their own government their day in court.

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