

Out with the old, in with the new — and don't change a thing

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One of the longest bills in recent history — 956 pages — is making its way through the General Assembly.

And if it passes, it won't change a thing of substance.

Instead, House Bill 11 is designed to recodify the criminal law into one Criminal Law Code, simplify the language where necessary and delete provisions that have become outdated or unenforceable. A disclaimer by the committee that drafted the proposal calls it a "nonsubstantive revision."

Right now, most of the laws HB 11 would bind together are found in Article 27. Others are scattered in sections on agriculture, commerce, the environment, health and natural resources.

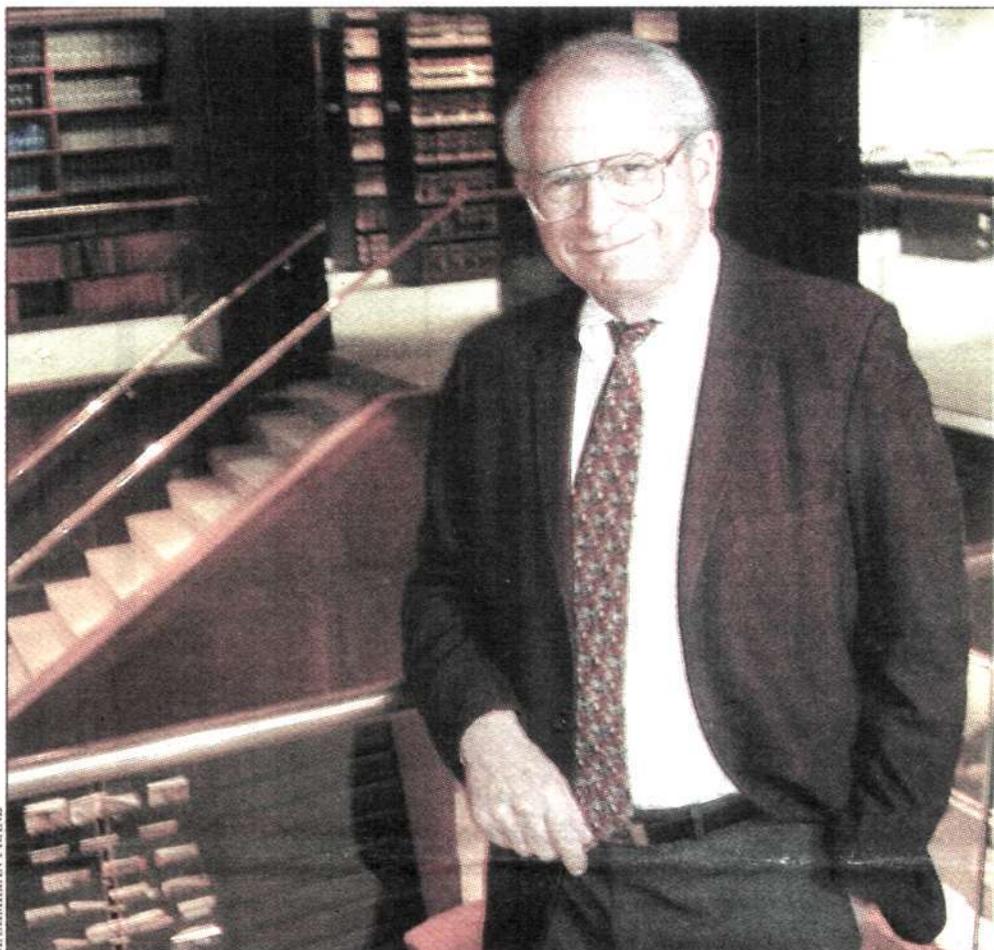
It took a committee more than three years to write this behemoth.

"I had two kids born in that time," said Robert K. Smith, principal analyst in the Department of Legislative Services and Criminal Law Article supervisor.

The Criminal Law Review Committee, chaired by Court of Appeals Judge Alan M. Wilner, met 33 times and combed through an average of 57 typed pages of law at each meeting, said Susan G. Phelps of the Legislative Services Department and manager of code revision.

Besides heading the criminal law committee, Wilner also is chairman of the broader Code Revision Committee, which is responsible for recodifying all the state's laws. (The committees were created by the legislature in the 1970s and are under the oversight of Legislative Services.)

Wilner's stated purpose is to make it eas-



The Criminal Law Review Committee, chaired by Court of Appeals Judge Alan M. Wilner, above, seeks not to change the criminal law but to clean and consolidate it, so it's all in one place.

ier for the public to understand the law — unlike the Roman emperor Nero, who, according to legend, was wont to issue edicts without telling people what the laws said. He then punished people for violating the laws they couldn't possibly know anything about.

"We looked at things that appeared to be

obsolete," Wilner said. "The new code volumes have topical organization, and all related provisions are located together or cross-referenced."

In the case of the Criminal Law Code, that means attorneys will have to learn a

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Lessons from Nero: Codification as a revolutionary idea

Judge Alan M. Wilner, generally recognized as the state's authority on these matters, says the modern codification effort began in 1970 and was to have been completed within five years.

It didn't happen.

"We are hoping to be done by 2011," said Susan G. Phelps of the Department of Legislative Services. "That may be wishful thinking."

Codifiers finished three articles in 1973, the same year Wilner joined the Code Revision Committee, which is responsible for re-codifying all the state's laws. To date, 26 areas of law have been completed.

A speech given by the judge in 1994 is still used by the Maryland State Archives' Web site, (www.archives.state.md.us) to explain codification.

Titled "Blame it All on Nero: Code Creation and Revision in Maryland," Wilner's text traces the history of codification from the American Revolution.

A House of Delegates resolution in 1794 decreed that the state's laws were "from a variety of causes, confused, uncertain and contradictory." The delegates approved a

commission to "compile, digest and consolidate into one bill" all of the state's laws. The Senate, however, authorized a committee to prepare a report for the Legislature that merely told which English statutes were still in force.

The House continued to push for a comprehensive codification, and in 1798 appointed surgeon cum attorney William Kilty to compile the laws.

Kilty published a two-volume compilation in 1799, and various efforts to collect and organize the State's laws followed.

However, these "were not true codes," Wilner wrote. "The actual statutes, which constituted the law, were scattered in many volumes. When a law was repealed, the Legislature simply passed a law saying that the former law was repealed. If it wanted to amend a statute, it passed a new statute stating that the existing statute was 'supplemented' in the manner set forth."

In 1851, the "first true code creation effort was mandated," Wilner wrote. That year, the Constitutional Convention required the Legislature, "in amending any article or section thereof, to enact the same as the

said article or section would read when amended."

The Legislature then appointed a small group of legal scholars to revise and simplify the law, and in 1860 the General Assembly adopted the code that repealed all earlier laws and reinstated them in more modern language and style, Wilner wrote.

Despite numerous efforts to correct problems as they surfaced, the code slipped into chaos, and there were several attempts to re-codify the laws between 1886 and 1970.

The red-bound volumes of the Maryland Code represent the modern codifications, Wilner said.

The black-bound volumes in most Maryland law libraries today are code versions that were grouped together in 1957 by the Michie Co. (now Lexis-Nexis). The Michie effort was not a comprehensive codification, however, Wilner noted.

Until the 1970s, "1888 was the last time they really looked at the language," he said. "The last time anyone really, really looked at the thing was 1860."

— Earl Kelly

Code

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new language if HB 11 passes. For years, they have used a shorthand keyed to the old law. For example, a "643(b)" charge meant the defendant was charged with a violent crime. That will become a "14-101" case under the new code.

Cleaning house

In addition to better organization, the new code volumes aim to use simpler language, Wilner said.

"It is organized and written in such a way the average citizen can understand it," Wilner said. "We don't use subjunctives. We don't use passive voice unless it is important that it be said that way."

Codification committees "can catch unintentional errors and egregious lapses in memory" on the part of the General Assembly, said State Archivist Edward C. Papenfuss. "They are not making law. What they are doing is clarifying the law."

Well, that — and sometimes, cleaning out the legal attic.

Take §152 of Article 27, an 1886 law that dealt with "Female Sitters": women whose job it was to drum up sales at "entertainment or concert halls" by getting men to buy them drinks, cigarettes or other "refreshments."

Employing female sitters was punishable by fines that ranged from \$200 to \$1,000 and imprisonment of two to 12 months. But, in 1984, the Court of Appeals struck down the law as an unconstitutional violation of the Maryland Equal Rights Amendment, which prohibits imposing different burdens on citizens based solely on sex.

If HB 11 passes, the female sitter law will be deleted from the Criminal Law Code.

Another outdated provision deals with cates. The state hasn't issued such certificates since 1832, when they were used to finance construction of the first Maryland penitentiary.

In another part of the bill, the ancient law of misdemeanors meets the modern crime of interfering with cable and satellite television:

"In this section, the references to being 'guilty of a misdemeanor' are added to state expressly that which was only implied in the former law. In this State, any crime that was not a felony at common law and

has not been declared a felony by statute is considered to be a misdemeanor."

Fear of 'snakes'

For a bill like HB 11 to succeed, legislators must believe there are no "snakes" — hidden provisions — lurking in the nearly 1,000 pages of small type.

For Del. Sharon M. Grosfeld, D-Montgomery and chairman of the Judiciary Committee's Criminal Justice Subcommittee, that means taking pains to gain her fellow lawmakers' trust.

Grosfeld discussed some of those efforts after a recent committee hearing at which she explained HB 11 and related measures.

To keep HB 11 free of substantive changes, Grosfeld introduced several smaller bills to make specific changes in the law. For example, one bill would change existing law that speaks of burglary "with explosives" to the more inclusive "destructive device."

Also, in an effort to win legislators' trust, HB 11 takes the unprecedented step of stating that any change to the law "shall be construed as a nonsubstantive revision, and may not otherwise be construed to render any substantive change in the criminal law of the State."

As a final safeguard, recommendations for significant substantive changes to the criminal law are made by a separate committee, one chaired by Court of Special Appeals Chief Judge Joseph F. Murphy Jr.

But even these safeguards weren't enough for Del. Anthony J. O'Donnell, R-Calvert/St. Mary's, the only member of the Judiciary Committee to vote against HB 11.

"I'm concerned that there could be unintended changes in the law that may not be apparent in such a large bill," O'Donnell said. "I believe that not one legislator has read that bill with a critical eye."

When asked what would be a better way to codify the law, O'Donnell said, "That's a good question. I don't know." ... earned a favorable report out of committee on Monday. The full House was scheduled to vote on the measure yesterday.

And, after all this time and ink, proponents of HB 11 are hoping that history will not repeat itself.

In the 1960s a committee suggested a new criminal law code, but the Legislature rejected it, according to Smith of Legislative Services, because it would have moved Maryland away from its common law heritage and made it a statutory state.