The Wolfenden Report
The Wolfenden Report concluded that “there must remain a realm of private morality and immorality which is…not the law’s business.” The committee was commissioned to study some difficult questions about prostitution and sodomy in order to see what sorts of principles should be put into play so that there was some rationale to making homosexuality illegal without making premarital sex or certain sex acts performed by married couples illegal. As they saw it:

The function of the criminal law is to preserve public order and decency, to protect the citizen from what is injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable….It is not…the function of the law to intervene in the private lives of our citizens.

Patrick Devlin: The Enforcement of Morals
Devlin maintains that “the criminal law as we know it is based on upon moral principle. In a number of crimes its function is simply to enforce a moral principle and nothing else.” A key issue behind the debate over legal moralism is the extent to which a moral code should shape our laws.

Devlin claims that it is not possible to set limits to the power of the State to legislate against immorality. What is his argument in support of this claim? It goes roughly like this:

1. Humankind needs society.
2. What makes a society of any sort is community of ideas, not only political ideas but also moral ideas about the way its members should behave and govern their lives. (The structure of every society is made up both of politics and morals. Society is held together by invisible bonds of common thought.)
3. Whatever threatens those common bonds threatens society.
4. Society has a right to protect itself against threats to those common bonds. (Society is entitled by means of its laws to protect itself from dangers, whether from within or without. The analogy to law of treason: It is no more possible to define a sphere of private morality than it is to define one of private subversive activity.)
5. An established morality is as necessary as good government to the welfare of society. Therefore
6. Society has a right to protect itself against anything that threatens its shared morality.

See if you can identify the key claims in the reading and annotate your reading indicating the main elements of his argument and other issues that arise.

Some additional issues to keep in mind:

- How does Devlin establish that there is indeed a public morality?
• The standard of the reasonable man: “he is not expected to reason about anything and his judgment may be largely a matter of feeling.”
• Immorality is what every right-minded person is presumed to consider to be immoral.
• The analogy between vice/immorality and subversion (the social cement argument): is this analogy persuasive?
• How do we reconcile public and private interests? Devlin defends three elastic principles for doing so.

H. L. A. Hart
Hart begins with a critical examination of Devlin’s view of the nature of morality, especially his “abjuration of the notion that reasoning or thinking has much to do with morality.” Devlin’s view is based not on divine commands or rational principles of human conduct but on “real reprobation” and a combination of “intolerance, indignation, and disgust.”

Hart’s basic point: Devlin’s view obscures the points at which thought is needed before we turn popular morality into criminal law. “Before general moral feeling is turned into criminal law it is submitted to scrutiny of a different kind from Sir Patrick’s.”

Briefly and concisely summarizing Hart’s critique of Devlin, it might consist of the following points:

1. Hart is more inclined to accept the liberal doctrine elucidated by Mill, especially in regard to harm.
2. We must ask whether a practice which offends moral feeling is harmful.
3. Devlin provides no empirical support for the central claim that deviations from public morality threaten society.
4. He mistakenly assumes that morality is a seamless web.
5. Hart rejects the analogy between treason and homosexuality.
6. Hart employs the analogy to burning of old women for witchcraft to establish the ways in which morality can be based on ignorance, superstition, or misunderstanding.
7. Devlin mistakenly assumes that society is to be identified with its morality.
8. Devlin mistakenly assumes that there is a shared and identifiable public morality.

Two Questions:
1. We must ask whether a practice which offends moral feeling is harmful, independently of its repercussion on the general moral code.
2. What about repercussion on the moral code? Is it really true that failure to translate this item of general morality into criminal law will jeopardize the whole fabric of morality and so of society?