

The Case for the Vaccine Passport

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Résumé de l'article

Dans ce commentaire critique, nous abordons la critique égalitaire selon laquelle l'utilisation d'un passeport vaccinal est contraire à l'éthique car elle entre en conflit avec le principe d'égalité, compris comme exigeant que les citoyens soient traités de la même manière. Nous soutenons que cette critique est vulnérable à l'objection de nivellement par le bas souvent adressée à certaines théories égalitaires. Nous ajoutons que le passeport vaccinal est moralement justifié si deux conditions éthiques minimales sont remplies : 1) il doit être conçu comme une restriction de santé publique temporaire et transitoire, et 2) les disparités de traitement qu'il introduit doivent empiéter le moins possible sur les droits fondamentaux et ne doivent pas empêcher l'accès aux services publics essentiels.



COMMENTAIRE CRITIQUE / CRITICAL COMMENTARY (ÉVALUÉ PAR LES PAIRS / PEER-REVIEWED)

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Jocelyn Maclure^{a,b}, Keven Bisson^a

Résumé

Dans ce commentaire critique, nous abordons la critique égalitaire selon laquelle l'utilisation d'un passeport vaccinal est contraire à l'éthique car elle entre en conflit avec le principe d'égalité, compris comme exigeant que les citoyens soient traités de la même manière. Nous soutenons que cette critique est vulnérable à l'objection de nivellement par le bas souvent adressée à certaines théories égalitaristes. Nous ajoutons que le passeport vaccinal est moralement justifié si deux conditions éthiques minimales sont remplies : 1) il doit être conçu comme une restriction de santé publique temporaire et transitoire, et 2) les disparités de traitement qu'il introduit doivent empiéter le moins possible sur les droits fondamentaux et ne doivent pas empêcher l'accès aux services publics essentiels.

Mots-clés

passeport vaccinal, preuve d'immunisation, Covid-19, égalité, équité, éthique de la santé publique

Abstract

In this critical commentary, we address the egalitarian critique according to which the use of a vaccine passport is unethical because it conflicts with the principle of equality, understood as requiring that citizens ought to be treated in the same way. We argue that this criticism is vulnerable to the levelling-down objection often addressed to some egalitarian theories. We add that the vaccine passport is morally justified if two minimal ethical conditions are satisfied: 1) it must be designed as a temporary and transitory public health restriction, and 2) the disparities of treatment it introduces ought to infringe as little as possible upon fundamental rights and should not negate access to essential public services.

Keywords

vaccine passport, immunization proof, Covid-19, equality, fairness, public health ethics

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INTRODUCTION¹

Managing a pandemic at the national level requires a strategic plan that articulates a range of public health measures to contain the spread of the virus. The current epidemiological context at the time of writing – often associated with the “fourth wave” in the Covid-19 pandemic – has persuaded many countries to use a new tool: an immunization certificate granting access to certain services or activities.

The introduction of this immunization certificate, known as the “vaccine passport” in Quebec, the “vaccine record” in Newfoundland, and the “vaccine certificate” in Ontario for example, has been highly controversial. This reaction is understandable, because the policy establishes a two-tier system of rights for citizens based on their immunization status. Thus, people who have received the second dose of a two-dose vaccine can benefit from nonessential activities such as going to the theatre, eating in restaurants, or sitting in the stands to watch their child's hockey game, while others cannot take advantage of the same opportunities. The ethical questions related to these disparities in treatment between the vaccinated and the unvaccinated is a growing concern as some countries, like Austria, have implemented a temporary lockdown for all citizens and then lifted it only for the vaccinated. In Austria, a vaccine mandate will go into effect in February 2022 (2).

In countries where everybody aged 12 and over who wish to be vaccinated have been able to do so, it is now the freedom of choice regarding vaccination and the rights and duties of those who are not vaccinated that are central to the ethical debate on vaccine passports. Is it fair to grant rights and opportunities to those who are adequately vaccinated and deny them to those who are not?

DOES FAIRNESS REQUIRES IDENTICAL TREATMENT?

The modern democratic era was propelled, according to Tocqueville, by a “passion for equality”. If the “democratic individual” generally tolerates disparities in wealth, she dislikes what she sees as privileges reserved for the members of certain categories of citizens. The democratic individual has more “ardent and enduring love, Tocqueville wrote, of equality than of liberty” (3). Equal rights or, to refer to John Rawls' first principle of justice, “equal liberty”, are seen as sacrosanct and as a bulwark against a return to the *Ancien Régime*.

Unsurprisingly, most critics of the use of the vaccine passport at the national level² base their criticisms on the two key principles of political legitimacy: *freedom* and *equality*. On the one hand, some critics see public health measures in general,

¹ This paper is a substantially revised and augmented version of a French-language manuscript by the authors, to be published in 2022 (1).

² A growing set of objections to vaccine passports are related to the disparities in vaccine access between countries. Even though this is an important issue, this article will solely focus on the national question (5).

and the vaccine passport in particular, as unduly restricting basic freedoms. Although widespread, we will only allude to the criticism of those who oppose public health measures on the grounds that they restrict the freedom of citizens in an excessive and unjustified manner and that the harm caused by the Covid-19 pandemic is exaggerated. We do not agree with this general view, but we will not here attempt to provide a sustained refutation.

On the other hand, criticisms of the vaccine passport based on the principle of equality argue that citizens should all be treated in the same way (4). If the epidemiology of a region calls for restrictive public health measures, they should apply equally – that is, identically – to all citizens. The Achilles' heel of this egalitarian critique is that it requires the levelling down of citizens' freedoms and opportunities. Social justice is understood as requiring that everyone's situation remains equally bad.

In contrast, we will argue that differential treatment at the national level is justified with regard to the use of an immunization certificate system during the Covid-19 pandemic. Of course, the use of this vaccine passport can only be justified if the vaccine passport is sufficiently effective, and it is. Even though many point out that the vaccine is not perfect³, the data is crystal clear that vaccinated people do not catch the virus as much, are much less sick after an infection, and do not die as much as unvaccinated people. The use of a vaccine passport, combined with other measures such as masking, greatly reduces the risk of transmission.

Being suspicious about differentiated treatment is a healthy reaction. But fairness, as many philosophers from Aristotle to Rawls have argued, is in some circumstances best served by treating certain classes of citizens differently. This position is based on the argument that the ethical benefits of such a public health measure outweigh the harm that it causes. We add, however, that the introduction of a vaccine passport is acceptable only if two minimal conditions of ethical acceptability are present: 1) that its application is designed to be temporary and transitory, and 2) that the disparities of treatment it introduces infringe as little as possible upon fundamental rights and do not negate access to essential public services. We will end this position paper by answering a further egalitarian criticism which asserts that a two-tier regime of rights and opportunities is likely to aggravate existing economic inequalities.

ETHICAL BENEFITS AND BURDENS

We believe that the introduction of a vaccine passport is morally justified because its ethical benefits are greater than the prejudices that it causes. The main reason is that the use of a vaccine passport is "Pareto optimal". Pareto optimality invites us to choose, as a matter of course, resource allocation schemes that improve the lives of some without making others worse off; in a Pareto optimal situation, at least one gains, whereas no one loses. Here we compare the use of a proof of vaccination to the *status quo ante*, namely the phases of the pandemic when more restrictive and universal public health measures prevailed. This contrasts with the libertarian critique that compares a situation in which proof of immunization is required to one in which public health measures have been abandoned. In other words, libertarian critics challenged universal public health measures during the earlier phases of the pandemic, and they now oppose the combination of the lift on some of these measures and the use of a vaccination proof. Because we believe that these critics greatly underestimate the harm caused by non-interventionism, we will set aside that comparison.

Seen from that perspective, the introduction of a vaccine passport satisfies the principle of Pareto optimality because it allows fully vaccinated citizens to resume certain activities and, in so doing, to return to a richer social life, whereas those who have not yet been fully vaccinated must wait or forego these opportunities until the health crisis is over. The use of vaccine passport allows, for example, some people who are heavily affected by the pandemic and the associated public health interventions to relaunch their professional projects, whether it is the reopening of a restaurant or the possibility of returning on stage for an actor or a musician. The use of a vaccine passport thus allows vaccinated individuals to live fuller lives and contributes significantly to the recovery of sectors adversely affected by the pandemic.

One could note here that the Pareto optimality-based argument sketched out is compatible with a widening of socioeconomic inequalities (the most disadvantaged do not lose, but the privileged win). Let us remember that a (green) economic recovery is in the interest of all citizens, including the most disadvantaged. We must not make the mistake of thinking that there are, on the one hand, ethical considerations such as those relating to equality, freedom and wellbeing and, on the other hand, economic considerations related to slowdown, unemployment, fiscal stimulus and so on. Economic issues always have an ethical dimension, and ethical issues very often have an economic dimension. For instance, many argued that an ethic of solidarity was called for in the first waves of the pandemic (6). An ethic of solidarity requires that states support and compensate the citizens who are the most negatively affected by the crisis. The principle of solidarity involves recognizing that our fate as individuals is inextricably connected to the fate of others, and that we act in the interest of the most vulnerable within our community (7).

The majority of states in wealthy countries have chosen to run significant deficits since the beginning of the pandemic (8). While governments have readily agreed, in a Keynesian spirit, to accept large deficits in order to support citizens and businesses hard hit by Stay-at-Home orders and physical distancing measures, they will need in due time need to phase out

³ The duration of the protection might be limited, their ability to protect against new mutations is uncertain, the protection is not complete, vaccinated people can also transmit the infection, and so forth.

these deficits. This could lead policy-makers to reduce or freeze funding for some universal public services or wealth redistribution policies, which will in all likelihood have a detrimental effect on the worst-off.

A TEMPORARY MEASURE

Our argument based on the comparison between the ethical benefits and harms of the vaccine passport can be seen as morally justified if and only if the measure is conceived as temporary and transitory. It goes without saying that, if the measure was conceived as permanent, a much stronger ethical justification would be required to justify such a departure from the principle of equal rights and opportunities.

That being said, it is true that the epidemiological uncertainty about the possibility of achieving herd immunity, the likely emergence of new variants, or the transformation of SARS-CoV-2 into a virus which is easier to live with entails that it is not possible at the time of writing to anticipate how long the use of a vaccine passport will be an effective and justified public health measure. That notwithstanding, our ethical horizon must be to stop using it as soon allowed for by the epidemiological situation. Many scenarios are possible. If the reproduction rate of the virus were to increase rapidly and the hospital capacity of the health system was once again strained, then a return to universal confinement measures may be necessary. In the opposite direction, a cautious and gradual phase-out of the use of a vaccine passport should accompany a decrease of the virus' reproduction rate. Finally, if the virus becomes endemic while remaining virulent, we will need to go back to the drawing board and deliberate on the optimal ways to mitigate the damage done by the virus.

BASIC RIGHTS AND ESSENTIAL PUBLIC SERVICES

The second condition of acceptability rests on the distinction between, on the one hand, essential public services and, on the other, social opportunities that are important but less closely connected to the respect of constitutionally protected rights. For the differential treatment of citizens on the basis of their vaccination status to be deemed acceptable, such disparities in treatment should spare fundamental rights as much as possible. As such, access to education and health care, the right to vote and, with some exceptions⁴, the right to work should not be subject to the vaccine passport scheme. Fundamental rights are not absolute but restricting them requires particularly strong justifications. At the time of writing, it seems plausible to think that a continued increase of the immunization rate combined with other public health measures such as the application of the vaccine passport in the context of nonessential activities will be sufficient to control the spread of the virus and avoid exceeding the hospitalization capacity of the health care system.

WILL THE VACCINE PASSPORT AGGRAVATE INEQUALITIES?

Egalitarians might grant that it is true that the benefits arguably exceed the cost, especially if the two conditions of acceptability are followed diligently. However, the benefits, even if largely surpassing the costs, might be reaped significantly more by some groups than others, and more importantly, by those who are already more privileged. The distribution of the benefits coming from differential treatment might well increase already existing inequalities. Thus, egalitarians might say that if differential treatment increases already existing inequalities, then it is still unethical to use the vaccine passport, even if the benefits exceed the burdens and prejudices it causes.

This is a serious issue. The data about the relations between vaccination rates and income is complex; vaccination rates tend to be high among older people, who have on average lower incomes, but they tend to be lower among less educated people among younger generations. Although we cannot here fully do justice to the complexity of this issue, let us reiterate that we are comparing the constrained use of a vaccine passport to the *status quo ante*. It is firmly established that the members of the less economically advantaged social classes suffered more from both the spread of the virus and the universal lockdown and physical distancing measures (9). A vaccine passport scheme allows many profit and non-profit organizations to resume with their activities and many low-skills workers to go back to work. The *status quo ante* can hardly be seen as preferable for the worst-off to the combination of lifting some universal restrictions and requiring a vaccination proof. Hence, unless egalitarians join forces with libertarians and call for a more rapid phasing out of all public health restrictions, they should welcome a limited use of a vaccination proof.

CONCLUSION

In conclusion, we consider the use of a vaccine passport to be desirable if it is temporary and only required to access nonessential activities. In addition, to be ethically acceptable, a vaccine passport scheme should not be viewed as an indirectly punitive measure for those who refuse to be vaccinated. If it seems reasonable to ask those who choose not to be vaccinated to bear some responsibility for the adverse social consequences of their choice, the vaccine passport should be seen first and foremost as a public health policy among others designed to bring about valued outcomes such as reducing virus transmission and reinvigorating social life. In France and in Quebec, the implementation of a vaccination passport has proven to be a powerful incentive to get the jabs for some hesitant or reluctant individuals. That said, access to the targeted activities should no longer be conditional to the possession of a vaccine passport once the vaccination threshold necessary for herd immunity has been reached, or when the virus has mutated into a sufficiently mild version. However, it should be kept in mind that there

⁴ Think, for instance, of health professional treating people susceptible to be gravely sick if they contract an infection.

is great uncertainty about the evolution of the pandemic, and if it turns out that such immunity is not achieved due to the evolution of the virus or to behavioural factors, a democratic deliberation will be needed on the possible longer-term use of proof of immunization, on mandatory vaccination or on a return to a more universal lockdown and physical distancing measures. Fortunately, the announced vaccination of children under twelve will help – other things being equal – in reducing transmission.

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None to declare

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