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Ethical, Legal and Social Implications of Vaccination Passports and Cards

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1. Definition and Typology of Health Certificates

What is a health certificate?

A document attesting that its bearer fulfils conditions relevant to their health or to public health. The concept is broad — their use varies considerably depending on purpose and context.

"It is absurd to conceive the debate on these tools as monolithic."
— de Miguel Beriain (2022)

Vaccination certificate

Evidences receipt of a vaccine against a specific disease.

Recovery certificate

Attests that the bearer has overcome infection and may have natural immunity.

Negative test certificate

Evidence of a recent negative infectivity test result.

Certificate of sterilising immunity

Attests that the bearer poses a significantly reduced risk of transmission.

2. The Discrimination Argument

The Objection

- Treats people differently based on immunological status — a biological criterion not under individual control.
- Historical precedent: 19th-century New Orleans, where yellow fever immunity created deep racial and social stratification.
- Grants 'privileges' to some citizens that others cannot access.

The Rebuttal

- Certificates are temporary and tied to a specific epidemiological crisis, unlike permanent biological stratification.
- Certificates are accessible through vaccination or testing — not determined by birth or biology.
- Key insight: Certificates do not grant privileges — they selectively restore rights that were suspended for everyone.
- NOT using certificates = "downward levelling" = discriminating against those who pose no health risk.

3. The Equity Problem

Structural barriers to access

Limited healthcare access

Undocumented migrants and low-income groups often lack formal access to vaccination or testing services.

Distrust of institutions

Minority communities may exhibit higher vaccine hesitancy due to historical discrimination in medical settings.

Cost of testing

Where testing is not free, the most vulnerable cannot afford the means to obtain a certificate.

Digital exclusion

Elderly and low-literacy populations may be unable to use digital certificate systems.

The appropriate response: better design, not abandonment

Free/subsidised testing · Accessible vaccination · Paper-based alternatives · Culturally sensitive outreach

The key question is not whether certificates are perfectly equitable, but whether their alternatives — principally, generalised confinement — are more equitable. They are not.

4. Scientific Uncertainty and Perverse Incentives

Scientific Uncertainty

Problem:

Certificates may not reliably reflect current non-infectivity. COVID-19 vaccines did not provide sterilising immunity, creating a gap between what the certificate states and the actual risk of transmission.

Solution:

- Be transparent about what each certificate type attests.
- Do not conflate vaccination certificate with non-infectivity certificate.
- Recent sensitive test results = stronger indicator.
- Design systems to reflect scientific distinctions; communicate them clearly.

Perverse Incentive: Voluntary Contagion

Concern:

If immunity is a gateway to freedom, low-income individuals may deliberately seek infection to obtain a certificate and avoid poverty or job loss.

Response:

- This concern is greatly reduced when safe alternatives (vaccines, affordable tests) are widely available.
- It is ethically wrong to restrict rights of the many because of potential misbehaviour of the few.
- The correct response is to address underlying poverty and provide income support — not to perpetuate confinement of all.

5. Legal Framework: Proportionality and Fundamental Rights

The Principle of Proportionality (Art. 52(1) EU Charter)

① Suitability

A certificate conditioning access on a reliable indicator of low infectivity (e.g., recent negative test) demonstrably reduces risk of transmission. ✓ IF designed correctly.

② Necessity

Certificates must be the least restrictive alternative. If alternatives (masks, ventilation, tracing) suffice → certificates unjustified. If only alternative is confinement → certificates are less restrictive of movement and work. ✓ Context-dependent.

③ Proportionality *stricto sensu*

Balance between public health benefits and harms to freedom of movement, assembly, and right to work. Greater threat = clearer justification. Lower threat = harder to justify. ✓ Graduated.

ECHR Framework

Art. 5 (liberty) · Art. 2 Prot. 4 (freedom of movement) · *Enhorn v. Sweden*: restrictions on liberty lawful only where disease is dangerous AND less severe measures have been found insufficient.

Key argument: certificates may not restrict freedom of movement — they may DEFEND it by avoiding total confinement.

6. Data Protection: GDPR Challenges and Safeguards

Special category data

Art. 9 GDPR

All certificate systems involve processing of health data — special category data subject to strict conditions. Member States must establish a specific legal basis before processing.

Data minimisation

Art. 5(1)(c) GDPR

Verifiers need only know whether the bearer is low-risk — not WHY (vaccination, recovery, or test). Systems should convey minimum necessary information.

Authorised verifiers

Art. 9(2) GDPR

Requiring private actors (bar owners, employers) to process health data is disproportionate. They lack confidentiality obligations and data-handling expertise. Random checks by public authorities are preferable.

Temporal limitation

Sunset clauses essential

Emergency measures must not become permanent. Post-9/11 surveillance powers illustrate the risk. Mandatory review periods and independent oversight are essential safeguards.

Conditions of Legitimacy: When Are Passports Justified?

① Conceptual clarity

Certificates must accurately reflect what they attest. Vaccination ≠ non-infectivity. Transparency about scientific limitations is non-negotiable.

② Equity of access

Free testing, accessible vaccination, paper-based alternatives, and inclusive outreach must be in place before broad deployment.

③ Proportionality

Justified only as a less restrictive alternative to available measures. Not permanent; not pretextual. Tied to the severity of the epidemiological threat.

④ Data protection by design

GDPR compliance from the outset: minimisation, purpose limitation, authorised verifiers, sunset clauses, independent oversight.

⑤ Temporary and reviewable

Sunset clauses and mandatory review periods. Emergency measures must not become permanent features of the legal landscape.

⑥ Restoration, not privilege

The deployment of certificates is the selective restoration of rights suspended by necessity — not the grant of privilege. This framing is essential.

Conclusions

Legitimacy is conditional, not absolute

Immunity certificates can be ethical, legal, and socially acceptable — but only if properly designed. Blanket acceptance or rejection are both intellectually dishonest.

Certificates defend freedom, not restrict it

Where confinement is the alternative, immunity certificates are instruments of freedom. Refusing to deploy them may itself violate the ECHR and the EU Charter.

Liberal democracy demands this analysis

"Fundamental rights should only be sacrificed when there is no other feasible alternative. The moment this scenario is not fulfilled, we must opt for freedom."
— de Miguel Beriain (2022)