

# PASSPORTS OF PRIVILEGE

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## ABSTRACT

*All Americans sixteen and older are now eligible to receive a COVID-19 vaccination. However, many will not be able to access such vaccinations due to their work situation, health status, and inaccessible vaccination sites. Some have suggested that the use of vaccine passports, credentials used to gain access to places and countries by showing proof of vaccinations, may encourage people to get vaccinated. The COVID-19 pandemic has laid bare deep inequities in our society, and this Article argues that the use of vaccine passports would further exacerbate such chasms. Part I of this Article describes the differences between immunity passports and vaccine passports and the scientific uncertainty about their use, given the novel nature of this virus. Part II discusses whether the use of vaccine passports are legal in the United States. Part III discusses the ethical problems of immunity serving as a marker for the privilege to re-enter society, and the unwise focus on a technological fix for what is essentially a public health and equity disaster. While vaccine passports arguably may produce greater absolute economic benefits in the short term, a more equitable approach would be to address the social determinants of health and thereby spur far greater distributional economic benefits in the long term.*

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## TABLE OF CONTENTS

Introduction.....	1730
I. Defining Immunity Passports and Vaccine Passports .....	1733
A. Immunity Passports.....	1734
B. Vaccine Passports .....	1738
C. Vaccines Passports Preferred Over Immunity Passports.....	1739
D. Scientific Uncertainty .....	1740
II. Legality of Vaccine Passports .....	1741
A. Legal Authority .....	1743
B. Privacy Laws .....	1744
C. Employment Related Vaccine Passports .....	1747
D. The Americans With Disabilities Act .....	1748
E. Just Because You Can Do It Does Not Mean You Should.....	1751
III. Ethical Pitfalls of these Passports .....	1752
A. Solidarity and the Slippery Slope .....	1752
B. Policing.....	1753
C. Fairness and Vaccine Passports .....	1754
D. Structural Discrimination and Vaccine Passports.....	1756
IV. The Journey to Health Justice .....	1759
Conclusion.....	1762

## INTRODUCTION

Imagine scanning your smartphone as you arrive at work to prove that you have had your COVID-19 vaccination(s) or that you have antibodies for the COVID-19 infection. Although the prospect may have once seemed like science fiction a few years ago, private industry and government are now actively considering this option.<sup>1</sup>

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1. See generally *International Monitor: Vaccine Passports and COVID Status Apps*, ADA LOVELACE INST. (June 22, 2020), <https://www.adalovelaceinstitute.org/project/international-monitor-vaccine-passports-covid-status-apps> [https://perma.cc/XBY4-GHGJ] (tracking developments in policy and practices concerning vaccine certifications and mobile apps); Geoff Herbert, *What is the Excelsior Pass? How NY's Covid App will Be a Passport for Attending Events*, SYRACUSE.COM (Mar. 4, 2021), <https://www.syracuse.com/coronavirus/2021/03/what-is-the-excelsior-pass-how-nys-covid-app-will-be-a-passport-for-attending-events.html> [https://perma.cc/8F2Q-QPD4] (explaining Excelsior Pass and how it can contain test results or vaccine status in a print-

Despite political<sup>2</sup> and ethical<sup>3</sup> objections to them, companies are working on vaccination passports, such as digital vaccination credentials, for use at workplaces, airports, and even crowded venues, such as concerts.<sup>4</sup> In the United States, the Centers for Disease Control and Prevention (CDC) has printed paper vaccination cards for use by anyone who has received a COVID-19 vaccination.<sup>5</sup> The purpose of the card is to show details about the vaccine that a person received and to serve as a reminder to individuals about when they should receive their second dose (if needed).<sup>6</sup> Some speculate that such vaccination cards

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out or mobile wallet application to access venues or businesses); Hadas Gold, *Israel Vaccination 'Green Pass' May Offer a Glimpse of a Post-Covid Future*, CNN (Mar. 11, 2021), <https://www.cnn.com/travel/article/israel-vaccine-green-pass-wellness/index.html> [<https://perma.cc/Z2DV-RX9H>] (noting Israel's use of a "green pass" to gain access to venues and events alongside other COVID-19 preventative measures such as masks and vaccines); Soo Kim, *COVID Vaccine Passports Announced by Israel in World First*, NEWSWEEK (Dec. 14, 2020, 10:19 AM), <https://www.newsweek.com/coronavirus-covid-vaccine-passport-israel-travel-quarantine-restrictions-waiver-1554534> [<https://perma.cc/HSF8-FXVZ>] (stating that Israel's "green passport" "lift[s] some restrictions, including mandatory quarantine . . . and offer[s] access to cultural events and restaurants . . .").

2. See Sara Clements et al., *Florida Governor Issues Executive Order Prohibiting COVID-19 Vaccine Passports*, JD SUPRA (Apr. 5, 2021), <https://www.jdsupra.com/legalnews/florida-governor-issues-executive-order-5690465> [<https://perma.cc/LH2B-NF2B>] (showing how Republican Governor DeSantis banned the use of vaccine passports in Florida, although the legality of such a measure is questionable); see also Martin Kuldorff & Jay Bhattacharya, *Vaccine Passports Prolong Lockdowns*, WALL ST. J. (Apr. 6, 2021, 12:30 PM), <https://www.wsj.com/articles/vaccine-passports-prolong-lockdowns-11617726629>.

3. See Adriana Diaz, "Vaccine Passports" Spark Debate and Division, CBS NEWS (Apr. 8, 2021, 7:24 AM), <https://www.cbsnews.com/news/vaccine-passport-debate> [<https://perma.cc/CAB8-L3SJ>] (noting concerns about civil liberties and privacy while stating that the availability of digital vaccine passports raise stark equity concerns).

4. Natasha Singer, *Microsoft, Oracle and Salesforce Join a Push for Digital Vaccination Credentials*, N.Y. TIMES (Jan. 14, 2021), <https://www.nytimes.com/live/2021/01/14/business/us-economy-coronavirus/covid-vaccine-credentials-microsoft>; Dave Brooks, *How Ticketmaster Plans to Check Your Vaccine Status for Concerts*, BILLBOARD (Nov. 11, 2020), <https://www.billboard.com/articles/business/touring/9481166/ticketmaster-vaccine-check-concerts-plan> [<https://perma.cc/C43F-4NG8>].

5. *What to Expect at Your COVID-19 Vaccine Appointment*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 11, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect.html> [<https://perma.cc/2EC3-S4D8>].

6. *Id.* As of January 2021, two COVID-19 vaccines authorized by the U.S. Food and Drug Administration (manufactured by Moderna and Pfizer BioNTech) require two injections three or four weeks apart. *Answers to All Your Questions About Getting Vaccinated for Covid-19*, N.Y. TIMES (Feb. 19, 2021), <https://www.nytimes.com/interactive/2021/well/covid-vaccine-questions.html>.

could be used as vaccine passports that show proof of immune status to gain entry into spaces that may be restricted to non-immune individuals.<sup>7</sup> There are pilot projects, such as one collaboration between Apple and the Los Angeles Department of Health, that replace paper vaccination cards for digital ones in Apple Wallet.<sup>8</sup> This digital wallet may also serve as a conduit for a vaccine passport.

Since the beginning of the COVID-19 pandemic, the concept of so-called immunity passports has been floated as a way to allow people who have been infected with COVID-19 greater flexibility to access work, travel, and places where vulnerable individuals reside (such as long-term care facilities and hospitals for visitation or employment purposes).<sup>9</sup> Prior to the authorization of COVID-19 vaccines, private companies, such as TransferWise in Estonia, developed mobile applications to show that someone has immunity to COVID-19 because of a prior infection with the virus.<sup>10</sup> After the Food and Drug Administration (FDA) has authorized several vaccines,<sup>11</sup> the interest in

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7. Jonah E. Bromwich, *The Vaccinated Class*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/style/the-vaccinated-class/html> (last updated Feb. 4, 2021).

8. Emma Court, *Los Angeles Vaccine Recipients Can Put the Proof in Apple Wallet*, BLOOMBERG (Dec. 28, 2020, 8:00 AM), <https://www.bloomberg.com/news/articles/2020-12-28/los-angeles-vaccine-recipients-can-put-the-proof-in-apple-wallet> [<https://perma.cc/56LM-2XND>].

9. See Seema Mohapatra, *Why COVID-19 Immunity Passports May Violate US Law*, CONVERSATION (May 27, 2020, 8:22 AM), <http://theconversation.com/why-covid-19-immunity-passports-may-violate-us-law-138165> [<https://perma.cc/Y4KQ-SEMT>];

Govind Persad & Ezekiel J. Emanuel, *The Ethics of COVID-19 Immunity-Based Licenses* (“Immunity Passports”), 323 J. AM. MED. ASS’N 2241, 2241 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2765836>

[<https://perma.cc/SC5F-72RA>]; Henry T. Greely, *COVID-19 ‘Immunity Certificates’: Practical and Ethical Conundrums*, STAT (Apr. 10, 2020), <https://www.statnews.com/2020/04/10/immunity-certificates-covid-19-practical-ethical-conundrums>

[<https://perma.cc/B28B-X3QD>]; Alexandra L. Phelan, *COVID-19 Immunity Passports and Vaccination Certificates: Scientific, Equitable, and Legal Challenges*, 395 LANCET 1595, 1595–96 (2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31034-5/abstract](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31034-5/abstract); Aaron Holmes, *Fauci Says the Government Is Considering Giving out COVID-19 ‘Immunity Cards’ as Part of Push to Reopen the Economy*, BUS. INSIDER (Apr. 11, 2020, 3:02 PM), <https://www.businessinsider.com/the-government-is-considering-covid-19-immunity-cards-2020-4>.

10. Andrew Webb, *Coronavirus: How ‘Immunity Passports’ Could Create an Antibody Elite*, BBC NEWS (July 2, 2020), <https://www.bbc.com/news/business-53082917> [<https://perma.cc/77M8-Q437>].

11. See *COVID-19 Vaccines*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19>

immunity passports shifted from those that show natural immunity due to past infection to immunity via vaccination, what I call vaccine passports here. Companies are touting digital vaccine passport products such as mobile applications and QR codes that will show whether someone has been vaccinated for COVID-19 or not.<sup>12</sup> Some airlines are considering the use of such vaccine passports to make passengers feel safe about traveling.<sup>13</sup>

The COVID-19 pandemic has laid bare deep inequities in our society, and this Article argues that the use of immunity passports and vaccine passports would further exacerbate such chasms. Part I of this Article describes the differences between immunity passports and vaccine passports and the scientific uncertainty about their use, given the novel nature of this virus. Part II discusses whether the use of immunity passports would be legal in the United States. Part III discusses the ethical problems of immunity serving as a marker for the privilege to re-enter society, and the unwise focus on a technological fix for what is essentially a public health and equity disaster. While vaccine passports arguably may produce greater *absolute* economic benefits in the short term, a more equitable approach would be to address the social determinants of health and thereby spur far greater *distributional* economic benefits in the long term.

#### I. DEFINING IMMUNITY PASSPORTS AND VACCINE PASSPORTS

As a threshold matter, it is important to define what I mean by vaccine passports and immunity passports. This Article uses COVID-19

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vaccines [<https://perma.cc/NDE2-NYUS>] (last updated Mar. 11, 2021) (listing COVID-19 vaccines authorized for emergency use).

12. Daphne Leprince-Ringuet, *Tech Companies Are Racing to Build Smart Vaccine Passports. But Technology Isn't the Only Problem*, ZDNET (Jan. 21, 2021, 10:11 AM), <https://www.zdnet.com/article/tech-companies-are-racing-to-build-smart-vaccine-passports-but-technology-isnt-the-only-problem> [<https://perma.cc/8ZX8-BSYN>]; *Broad Coalition of Health and Technology Industry Leaders Announce Vaccination Credential Initiative to Accelerate Digital Access to COVID-19 Vaccination Records*, BUS. WIRE (Jan. 14, 2021, 7:00 AM), <https://www.businesswire.com/news/home/20210114005294/en/Broad-Coalition-of-Health-and-Technology-Industry-Leaders-Announce-Vaccination-Credential-Initiative-to-Accelerate-Digital-Access-to-COVID-19-Vaccination-Records> [<https://perma.cc/F5HQ-V3WH>].

13. See Kif Leswing, *Companies Are Racing to Build Digital Passports for People to Prove They've Had the Covid Vaccine*, CNBC (Jan. 24, 2021, 8:25 AM), <https://www.cnbc.com/2021/01/24/vaccine-passes-could-get-us-back-in-bars.html> [<https://perma.cc/D2K5-3QQ7>] (discussing how Emirates Airlines plans to use an app to verify passengers' COVID-19 vaccines before flying).

as a case study to discuss the legal and ethical aspects of such passports, but such passports could be created for any disease or health condition. Although the term passport conjures up images of traveling beyond national borders, these passports are not limited to use related to travel.

#### A. *Immunity Passports*

An immunity passport refers to a digital or paper document that indicates that the passport holder has immunity to a disease, as indicated either by past infection or a positive antibody test to a certain disease.<sup>14</sup> In order to gain an immunity passport, one must either have proof of COVID-19 infection, via a positive test, or proof of antibodies to COVID-19 infection, as demonstrated by a positive antibody test.<sup>15</sup> In an April 2020 Brief, the World Health Organization (WHO) cautioned against the use of such passports noting that “[t]here is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection.”<sup>16</sup> When vaccines for COVID-19 had not yet been developed, the idea of immunity passports was that those who have had either an active or asymptomatic COVID-19 infection would be able to get a passport so that they would be able to bypass certain quarantine or lockdown restrictions and perhaps even be allowed to travel and access spaces restricted to others.<sup>17</sup>

For immunity passports based on natural immunity, there is a real concern about people seeking to be infected on purpose to gain privileges.<sup>18</sup> This is not new. The history of yellow fever immunity passports reveals problems that might recur.<sup>19</sup> Deliberate self-infection

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14. Mark A. Hall & David M. Studdert, *Privileges and Immunity Certification During the COVID-19 Pandemic*, 323 J. AM. MED. ASS'N 2243, 2243 (2020), <https://jamanetwork.com/journals/jama/fullarticle/2765835>.

15. *Id.*

16. WORLD HEALTH ORG., “IMMUNITY PASSPORTS” IN THE CONTEXT OF COVID-19 1 (2020).

17. See PERSAD & EMANUEL, *supra* note 9, at 2241 (discussing how immunity licenses could “enable[e] patronage of bars and restaurants and in-person attendance of cultural, worship, and sporting events”).

18. Kathryn Olivarius, *The Dangerous History of Immunoprivilege*, N.Y. TIMES (Apr. 12, 2020) [hereinafter Olivarius, *Dangerous History*], <https://www.nytimes.com/2020/04/12/opinion/coronavirus-immunity-passports.html>; see also Faith Karimi & Jamiel Lynch, *Young People Are Throwing Coronavirus Parties with a Payout when One Gets Infected*, Official Says, CNN (July 2, 2020, 5:19 PM), <https://www.cnn.com/2020/07/02/us/alabama-coronavirus-parties-trnd> [<https://perma.cc/E2FM-CKX6>].

19. Olivarius, *Dangerous History*, *supra* note 18.

occurred<sup>20</sup> in New Orleans with yellow fever over a century ago.<sup>21</sup> Poor immigrants sought out yellow fever infection, even though it had a high fatality rate, for financial opportunities that were reserved for those who survived yellow fever, which was known as being “acclimated.”<sup>22</sup> Kathryn Olivarius writes about how a German immigrant in New Orleans during the yellow fever scourge was infected and survived yellow fever.<sup>23</sup> As a result, he possessed “immunocapital,” which she defines as “socially acknowledged lifelong immunity to a highly lethal virus, providing access to previously inaccessible realms of economic, political, and social power.”<sup>24</sup> Access to housing, earnings, creditworthiness, eligibility for life insurance, and even marriage turned on whether a person had been “acclimated.”<sup>25</sup> The seasonal quarantine in effect between the United States and Cuba at the turn of the twentieth century was undermined by lack of consistent medical rigor in the evidence required to obtain an immunity certificate and by the existence of a black market in fake certificates.<sup>26</sup>

Another concern with immunity passports is how to determine who has had COVID-19. There has been a lack of adequate testing capacity in the United States for COVID-19 infection.<sup>27</sup> Several COVID-19 antibody tests are available, but the CDC cautions<sup>28</sup> that the presence of antibodies does not necessarily mean that one cannot be re-infected with COVID-19.<sup>29</sup> This same concern also led the WHO to be skeptical about the use of antibody-based immunity passports.<sup>30</sup> Despite

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20. *Id.*

21. Kathryn Olivarius, *Immunity, Capital, and Power in Antebellum New Orleans*, 124 AM. HIST. REV. 425, 425, 429 (2019) [hereinafter Olivarius, *Immunity, Capital, and Power*].

22. Olivarius, *Dangerous History*, *supra* note 18.

23. Olivarius, *Immunity, Capital, and Power*, *supra* note 21, at 425.

24. *Id.*

25. Olivarius, *Dangerous History*, *supra* note 18.

26. STATE BD. HEALTH FLA., ELEVENTH ANNUAL REPORT 98–99, 117 (1900).

27. Keith Collins, *Is Your State Doing Enough Coronavirus Testing?*, N.Y. TIMES (Nov. 1, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-testing.html>.

28. *Serology Testing for COVID-19 at CDC*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 3, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/lab/serology-testing.html> [<https://perma.cc/H4K8-22ZM>].

29. *Test for past Infection*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 2, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/testing/serology-overview.html#print> [<https://perma.cc/P6TG-W8U7>].

30. WORLD HEALTH ORG., *supra* note 16.

skepticism from the scientific community, immunity passport schemes continue to be considered.<sup>31</sup>

In the United States, the lack of strict oversight for COVID-19 antibody testing has added an additional layer of uncertainty. To protect the public, the FDA has rigorous rules and procedures that must be followed before a test can be sold in the United States.<sup>32</sup> Because of the pandemic and pressure to get test kits available, the FDA loosened its rules in March 2020.<sup>33</sup> It allowed manufacturers to produce COVID-19 antibody tests and bring them to market without FDA review, as long as they acknowledged that these results were not approved or authorized by the FDA.<sup>34</sup> More than 100 varieties of antibody tests were allowed on the market, although by May 2020, only twelve received FDA authorization.<sup>35</sup> A publicized scientific study found that of fourteen COVID-19 antibody tests on the market, only three of them delivered consistently reliable results.<sup>36</sup> Additionally, there were reports of companies making false claims that their products were FDA-approved and of products being marketed by

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31. The International Air Travel Association (IATA) has seen an increasing number of airlines sign up for its IATA Travel Pass—designed to help passengers manage their travel plans and provide airlines with proof that they have been vaccinated or tested for COVID-19. Sam Meredith, *Covid Vaccine Passports Are Being Considered. And Health Experts and Rights Groups Are Deeply Concerned*, CNBC (Feb. 26, 2021, 9:44 AM), <https://www.cnbc.com/2021/02/25/covid-vaccine-passports-health-experts-are-deeply-concerned.html> [<https://perma.cc/36CF-78HV>].

32. Under the FDA's new rules, a vendor must notify the FDA it is selling a test, affirm the product is valid, and label it as approved. See Anand Shah & Jeff Shuren, *Insight into FDA's Revised Policy on Antibody Tests: Prioritizing Access and Accuracy*, FOOD & DRUG ADMIN. (May 4, 2020), <https://www.fda.gov/news-events/fda-voices/insight-fdas-revised-policy-antibody-tests-prioritizing-access-and-accuracy> [<https://perma.cc/77Z9-5G3X>].

33. FDA, FDA-2020-D-0987, POLICY FOR CORONAVIRUS DISEASE-2019 TESTS DURING THE PUBLIC HEALTH EMERGENCY (REVISED) (2020).

34. Laurie McGinley, *Dozens of Coronavirus Antibody Tests on the Market Were Never Vetted by the FDA, Leading to Accuracy Concerns*, WASH. POST (Apr. 19, 2020, 4:39 PM), <https://www.washingtonpost.com/health/2020/04/19/fda-antibody-tests-coronavirus-review>.

35. David Lim, *FDA Reverses Policy that Let over 100 Antibody Tests on Market Without Review*, POLITICO (May 4, 2020, 12:59 PM), <https://www.politico.com/news/2020/05/04/fda-enacts-strict-rules-for-antibody-tests-after-congressional-investigation-233867> [<https://perma.cc/2QLS-6GQM>].

36. Apoorva Mandavilli, *Coronavirus Antibody Tests: Can You Trust the Results?*, NY TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/04/24/health/coronavirus-antibody-tests.html> (pointing out that even those top three tests “had some flaws”).



questionable vendors.<sup>37</sup> The House Oversight Economic and Consumer Policy Subcommittee launched an investigation of these claims.<sup>38</sup>

Two high level officials at the FDA noted that the FDA was worried about “unscrupulous actors marketing fraudulent test kits and using the pandemic as an opportunity to take advantage of Americans’ anxiety.”<sup>39</sup> There was also concern about the accuracy of such tests.<sup>40</sup>

As a result of various accuracy and marketing claims, the FDA changed its guidance about antibody testing.<sup>41</sup> The FDA started requiring antibody test manufacturers to submit emergency use authorization requests and validation data for review by the FDA within ten days of making an antibody test available.<sup>42</sup> But many of the antibody tests currently available are unreliable.<sup>43</sup> For example, some tests give too many false positive results, which could allow those who have not been infected with coronavirus to believe they were.<sup>44</sup> Some newer antibody tests, authorized by the FDA, are more accurate.<sup>45</sup>

The concept of what an immunity passport is in the context of the COVID-19 pandemic has shifted. In the first several months of the pandemic, many countries and private entities, such as technology

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37. Caroline Humer et al., *Special Report: FDA's Lax Rules on Coronavirus Blood Tests Open U.S. Market to Dubious Vendors*, REUTERS (Apr. 30, 2020, 3:04 PM), <https://www.reuters.com/article/us-health-coronavirus-tests-specialrepor/special-report-fdas-lax-rules-on-coronavirus-blood-tests-open-u-s-market-to-dubious-vendors-idUSKBN22C3IG>.

38. *Id.*

39. Shah & Shuren, *supra* note 32.

40. Christian Yates, *Coronavirus: Surprisingly Big Problems Caused by Small Errors in Testing*, CONVERSATION (May 5, 2020, 7:25 AM EDT), <https://theconversation.com/coronavirus-surprisingly-big-problems-caused-by-small-errors-in-testing-136700> [<https://perma.cc/HCF7-UZ9S>]; Shah & Shuren, *supra* note 32.

41. Sara Murray, *FDA Shifts Policy to Require Antibody Test Makers to Promptly Seek Emergency Use Authorization*, CNN (May 4, 2020, 10:14 AM), <https://www.cnn.com/2020/05/04/health/fda-antibody-test-eua-policy/index.html> [<https://perma.cc/7MY3-V33S>].

42. *Id.*

43. Zachary Brennan & David Lim, *FDA Pushed Through Scores of Inaccurate Antibody Tests Without Agency Review*, POLITICO (Apr. 27, 2020, 4:30 AM), <https://www.politico.com/news/2020/04/27/reliable-antibody-tests-coronavirus-207589> [<https://perma.cc/4EY6-W86F>].

44. *Id.*

45. *Study Suggests Abbott COVID-19 Antibody Test Highly Likely to Give Correct Results*, REUTERS (May 8, 2020, 11:30 AM), <https://www.reuters.com/article/us-health-coronavirus-abbott/study-suggests-abbott-covid-19-antibody-test-highly-likely-to-give-correct-results-idUSKBN22K24M> [<https://perma.cc/X5GZ-DDJ8>] (reporting that Abbott’s test resulted in no false negatives and rare false positives).

companies considered using immunity passports for COVID-19.<sup>46</sup> At the beginning of the pandemic, Chile's Ministry of Health announced that Chile was considering issuing passports, in the form of smartphone QR codes, to those who have recovered from COVID-19.<sup>47</sup> After some backlash, he backtracked and indicated that the cards would actually not certify immunity,<sup>48</sup> but instead advised governments and employers about their immunity passport services.<sup>49</sup> These physical documents or mobile applications would note that the passport holder has immunity to COVID-19.<sup>50</sup> The idea is to allow passport holders certain privileges, such as being able to travel internationally and work outside the home.<sup>51</sup> Some advocate for their use only in limited circumstances, such as for workers exposed to vulnerable individuals and those working in long term care facilities and hospitals.<sup>52</sup>

### B. Vaccine Passports

Vaccine passports are similar to immunity passports and refer to physical or digital proof of COVID-19 vaccination.<sup>53</sup> Although vaccine

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46. Siddharth Venkataramakrishnan, *Start-ups Race to Develop Covid-19 Immunity Passports*, FIN. TIMES (May 24, 2020), <https://www.ft.com/content/a5721020-5180-4cb4-ac7e-a464c65f3028> [https://perma.cc/Y8R6-NZ8K]; Kate Proctor & Hannah Devlin, *Coronavirus UK: Health Passports 'Possible in Months'*, GUARDIAN (May 4, 2020, 2:13 AM), <https://www.theguardian.com/politics/2020/may/03/coronavirus-health-passports-for-uk-possible-in-months> [https://perma.cc/DQP8-JYLG]. Chris Moss, *Health Passports 'Inevitable' as Governments Seek to Reopen Borders*, TELEGRAPH (May 14, 2020, 10:15 AM), <https://www.telegraph.co.uk/travel/comment/immunity-passports-coronavirus> [https://perma.cc/44FH-R8KR].

47. Helena Humphrey & Annabel Coleman, *Some Countries, Against Advice, Mull Certifying Ex-Virus Patients Immune*, NBC NEWS (May 6, 2020, 5:18 AM), <https://www.nbcnews.com/news/world/some-countries-against-advice-mull-certifying-ex-virus-patients-immune-n1200076> [https://perma.cc/G649-WFD4].

48. *In Reversal, Chile Says Coronavirus Release Certificates Will Not Prove Immunity*, REUTERS (Apr. 29, 2020, 3:11 PM), <https://www.reuters.com/article/us-health-coronavirus-chile-idUSKBN22B2ZY> [https://perma.cc/6UWA-VNJ5].

49. *See id.* (noting that certificates will indicate the completion of a mandatory quarantine after testing positive for COVID-19).

50. Persad & Emanuel, *supra* note 9, at 2241.

51. Humphrey & Coleman, *supra* note 47.

52. Persad & Emanuel, *supra* note 9, at 2241.

53. Melissa Locker, *Five Things to Know About Vaccine Passports*, SMITHSONIAN MAG. (Mar. 24, 2021), <https://www.smithsonianmag.com/travel/five-things-know-about-vaccine-passports-180977322> [https://perma.cc/FLX7-EY2E]; *see also Interim Position Paper: Considerations Regarding Proof of COVID-19 Vaccination for International Travellers*, WORLD HEALTH ORG. (Feb. 5, 2021), <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination->

passports are sometimes called immunity passports as well, because they can reflect vaccine-induced immunity, for purposes of this Article, I will refer to vaccine passports that show proof of immunization as distinct from immunity passports that show proof of antibodies or past infection. This Article is going to focus on vaccine passports, which bring up a whole host of ethical concerns that I summarize in Part III. As one critic put it, “Do we really want to be divided between the jabs and the jab-nots?”<sup>54</sup>

### C. Vaccines Passports Preferred Over Immunity Passports

Since COVID-19 vaccines became available for use, immunity passports did not gain traction.<sup>55</sup> Thus, the focus has shifted to vaccine passports over immunity passports for several reasons. First, it is unclear how long natural immunity lasts and whether it is consistent between individuals.<sup>56</sup> Additionally, the SARS-CoV-2 virus, the virus that causes COVID-19 infection, has been mutating and different variants, such as the U.K. Variant,<sup>57</sup> the Brazilian Variant,<sup>58</sup> and the South African Variant,<sup>59</sup> are becoming more common.<sup>60</sup> There have

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for-international-travellers [<https://perma.cc/HUG4-KM72>] (discussing technological, legal, and ethical implications of requiring proof of vaccination for international travelers).

54. Lionel Laurent, *Covid-19 Vaccine Passports Are a Ticket to Nowhere*, BLOOMBERG (Jan. 20, 2021, 1:00 AM), <https://www.bloomberg.com/opinion/articles/2021-01-20/covid-vaccine-passports-are-a-ticket-to-nowhere> [<https://perma.cc/324C-ZERP>].

55. Press Release, FDA, FDA Takes Key Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for First COVID-19 Vaccine (Dec. 11, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19> [<https://perma.cc/CW77-ZRXM>] (announcing authorization for the Pfizer-BioNTech vaccine); Press Release, FDA, FDA Takes Additional Action in Fight Against COVID-19 by Issuing Emergency Use Authorization for Second COVID-19 Vaccine (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid> [<https://perma.cc/H3N9-RYMT>] (announcing authorization for the Moderna vaccine).

56. Phelan, *supra* note 9, at 1596.

57. See *Emerging SARS-CoV-2 Variants*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 28, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/scientific-brief-emerging-variants.html> [<https://perma.cc/T72C-RA5L>] (discussing COVID-19 variant that emerged in the United Kingdom).

58. *Id.* (discussing COVID-19 variant that emerged in Brazil).

59. *Id.* (discussing COVID-19 variant that emerged in South Africa).

60. *Id.* (explaining that new variants arise because “[v]iruses generally acquire mutations over time”).

been cases where people who were infected with the original SARS-CoV-2 Virus have been infected again with a variant.<sup>61</sup> Such reinfection calls into question whether natural immunity even exists or how to predict how long it lasts. Thus, the remainder of this Article will focus on vaccine passports.

#### D. *Scientific Uncertainty*

The COVID-19 vaccinations are expected to provide some degree of immunity, but it is unknown how long that vaccine-conferred immunity lasts and whether recipients will be immune to the many variants of the SARS-CoV-2 virus.<sup>62</sup> Additionally, it is unknown if someone who is vaccinated can still transmit the virus and make others sick.<sup>63</sup> So there is scientific uncertainty about whether vaccine passports actually do what they are supposed to: prevent infection. As for immunity passports, there is also scientific uncertainty. Infection with COVID-19 causes the body's immune system to produce antibodies that can potentially recognize a second infection with the virus and neutralize it.<sup>64</sup> However, a test for these antibodies would not necessarily prove immunity.<sup>65</sup> It is unknown whether everybody who has been infected with COVID-19 would produce and maintain sufficient numbers of antibodies to confer protection, especially in

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61. *COVID-19 Variants Raise Concerns that People Can Get Infected Again*, CBS NEWS (Feb. 8, 2021, 4:39 PM), <https://www.cbsnews.com/news/covid-vaccine-variant-reinfection> [<https://perma.cc/RKS6-TL28>].

62. Andrew Joseph, *The Good and the (Potentially) Bad: What Scientists Know About Variants and Covid-19 Vaccines*, STAT (Feb. 5, 2021), <https://www.statnews.com/2021/02/05/what-scientists-know-variants-covid-19-vaccines> [<https://perma.cc/24V2-FX9L>].

63. Zaria Gorvett, *Can You Still Transmit Covid-19 After Vaccination?*, BBC (Feb. 3, 2021), <https://www.bbc.com/future/article/20210203-why-vaccinated-people-may-still-be-able-to-spread-covid-19> [<https://perma.cc/8M87-RH3U>]. Two kinds of immunity exist: “effective” immunity and “sterilising” immunity. *Id.* The first kind prevents a virus from causing serious disease symptoms but cannot stop the virus from replicating in the body's cells; therefore, people with only “effective” immunity could still transmit the virus to others even though they are immune to the disease. *Id.* By contrast, “sterilising” immunity prevents symptoms and transmission of the virus because the immune person's body produces neutralizing antibodies that bind to the virus and prevent it from gaining a foothold in the body at all. *Id.*

64. *Id.*

65. Françoise Baylis & Natalie Kofler, *COVID-19 Immunity Testing: A Passport to Inequity*, ISSUES IN SCI. & TECH. (Apr. 29, 2020), <https://issues.org/covid-19-immunity-testing-passports> [<https://perma.cc/UR7G-WRFQ>] (noting that COVID-19 antibody testing is quite inaccurate).

asymptomatic cases.<sup>66</sup> It is also unclear how long any immunity would last, what factors might determine its duration, and therefore how often antibody testing would need to be repeated. COVID-19 may produce natural immunity for one to two years, as with the related SARS and MERS viruses, or for a shorter period, as with the common cold.<sup>67</sup>

## II. LEGALITY OF VACCINE PASSPORTS

This Part will examine the legality of using vaccination passports to access travel to certain areas or on specific airlines, to escape lockdown and quarantine measures, and access work. In the United States, due to the emergency nature of the COVID-19 pandemic, vaccine passports are likely legally allowable.<sup>68</sup> Although this may seem like a novel question, mandatory vaccination requirements are not new.<sup>69</sup> Mandatory vaccination requirements are not new. The yellow fever “Carte Jaune” is required to travel to some countries, like Angola or Cameroon.<sup>70</sup> These yellow fever vaccination cards are used to signify that the holder of the card has received the yellow fever vaccine before traveling from a zone that is endemic for yellow fever.<sup>71</sup> Under the 2005

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66. *Id.*

67. Sharon Reynolds, *Lasting Immunity Found After Recovery from COVID-19*, NAT'L INSTS. HEALTH (Jan. 26, 2021), <https://www.nih.gov/news-events/nih-research-matters/lasting-immunity-found-after-recovery-covid-19> [<https://perma.cc/ZKH7-W7G6>].

68. *See infra* Section II.A.

69. Mandatory meningococcal vaccinations are required for all college and university students living on campus in many states. *State Information: MenACWY Vaccine Mandates for Colleges and Universities*, IMMUNIZATION ACTION COAL. (Feb. 19, 2020), <https://www.immunize.org/laws/menin.asp> [<https://perma.cc/62G6-V2QM>].

70. Mark D. Gershman et al., *Yellow Fever Vaccine & Malaria Prophylaxis Information, by Country*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 3, 2020), <https://wwwnc.cdc.gov/travel/yellowbook/2020/preparing-international-travelers/yellow-fever-vaccine-and-malaria-prophylaxis-information-by-country> [<https://perma.cc/8RXD-8E3T>]; *see also* Christopher Elliott, *What You Need to Know About Vaccine Passports*, WASH. POST (Dec. 30, 2020, 12:00 PM), [https://www.washingtonpost.com/lifestyle/travel/yellow-card-vaccine-passport/2020/12/30/746c0558-40b7-11eb-8db8-395dedaaa036\\_story.html](https://www.washingtonpost.com/lifestyle/travel/yellow-card-vaccine-passport/2020/12/30/746c0558-40b7-11eb-8db8-395dedaaa036_story.html) (suggesting that the World Health Organization's Carte Jaune, formally the International Certificate of Vaccination or Prophylaxis, “might be the leading candidate for an international coronavirus vaccine passport”).

71. Phelan, *supra* note 9, at 1595–98. Unlike the currently authorized vaccinations for COVID-19, the yellow fever vaccine confers immunity for nearly a lifetime. J. Erin Staples et al., *Yellow Fever Vaccine Booster Doses: Recommendations of the Advisory Committee on Immunization Practices, 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 647, 647 (2015). For COVID-19 vaccines, it is not clear how long vaccine induced immunity lasts.

International Health Regulations, countries can implement entry requirements relating to medical examination, vaccination, or other prophylaxis subject to certain conditions.<sup>72</sup>

Mandatory meningococcal vaccinations are required for all college and university students living on campus in many states, such as Florida and Colorado.<sup>73</sup> Additionally, every state and the District of Columbia has vaccination requirements for school entry.<sup>74</sup> Many parents have childhood immunization cards for their children to show proof of vaccination for school entry.<sup>75</sup> However, forty-five states and the District of Columbia exempt those who have religious objections to such vaccinations, and fifteen states allow philosophical exemptions due to personal, moral, or other beliefs of children's parents.<sup>76</sup> A vaccine passport scheme that did not have such exemptions may be on shaky ground.

The current composition of the Supreme Court seems to disfavor any impingement on religious exercise, even if it is for public health purposes. With the addition of Justice Barrett to the Supreme Court, the majority of the Court seems to be poised to protect religious institutions and religious practice, even if they risk the public's health. Before Justice Barrett joined the Court, the Court denied South Bay Pentecostal Church's request for injunctive relief against California's public health limitations on the number of people who could attend indoor religious services.<sup>77</sup> However, in February 2021, the Supreme

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*Frequently Asked Questions about COVID-19 Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html> [<https://perma.cc/VT3Z-XRP8>].

72. See WORLD HEALTH ORG., INTERNATIONAL HEALTH REGULATIONS art. 31(2) (3d ed. 2005) (allowing states to deny entry to unvaccinated travelers or travelers who fail to provide vaccination information, so long as they treat such travelers with respect for their dignity, human rights, and fundamental freedoms; minimize any discomfort or distress associated with the denial of entry; deny entry in a transparent and non-discriminatory manner; and abide by personal data requirements).

73. *State Information: MenACWY Vaccine Mandates for Colleges and Universities*, *supra* note 69.

74. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, NAT'L CONF. OF STATE LEGISLATORS (Jan. 29, 2021), <https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx> [<https://perma.cc/P8H5-BWJT>].

75. *Finding and Updating Vaccine Records*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 25, 2020), <https://www.cdc.gov/vaccines/parents/records/find-records.html> [<https://perma.cc/V353-SALX>].

76. *States with Religious and Philosophical Exemptions from School Immunization Requirements*, *supra* note 74.

77. See *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020).

Court granted an application for injunctive relief pending disposition of the petition for a writ of certiorari in *South Bay United Pentecostal Church v. Newsom*.<sup>78</sup> The Supreme Court enjoined California from enforcing its prohibition on indoor worship services against South Bay United Pentecostal Church.<sup>79</sup> The Court kept California's percentage capacity limitations and the prohibition on singing and chanting indoor in place.<sup>80</sup> Justice Gorsuch, with whom a majority of the justices joined or concurred, criticized California's restrictions as failing strict scrutiny because it failed to "explain why the narrower options it thinks adequate in many secular settings . . . cannot suffice" in religious contexts.<sup>81</sup> He noted that California does not force other businesses "to do all their business in parking lots and parks" and that there are contexts, like buses, where they allow people to sit close to each other.<sup>82</sup> Justice Gorsuch would have also enjoined California's ban on indoor singing and chanting, in part because the ban did not appear to apply to the entertainment industry.<sup>83</sup>

#### A. *Legal Authority*

*Jacobson v. Massachusetts*,<sup>84</sup> a 1905 Supreme Court case considering the legality of a Cambridge Board of Health regulation that required those who refused smallpox vaccinations to pay a five-dollar fine or face jail time, is long quoted as acknowledging the state's broad police power authority.<sup>85</sup> The Supreme Court held that the health regulation requiring smallpox vaccination was a reasonable exercise of the state's police power that did not violate the liberty rights of individuals under the Fourteenth Amendment to the U.S. Constitution.<sup>86</sup> *Jacobson* noted that a state's police power allowed it to uphold "such reasonable

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78. 141 S. Ct. 716, 716–17 (2021).

79. *Id.* at 716.

80. *Id.*

81. *Id.* at 717–19.

82. *Id.* at 718.

83. *Id.* at 719 ("[O]nce more, we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to its faithful.").

84. 197 U.S. 11 (1905).

85. *Id.* at 12, 14, 22; *see also* *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson*, 197 U.S. at 38) ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'").

86. *Jacobson*, 197 U.S. at 29–30.

regulations established directly by legislative enactment as will protect the public health and the public safety.”<sup>87</sup> *Jacobson* was decided before the tiers of scrutiny were created and also before the current constitutional tests, such as strict scrutiny and rational basis review.<sup>88</sup> However, until recently, it was accepted as authority for public health measures such as school vaccinations<sup>89</sup> and even forced sterilizations. In the infamous case *Buck v. Bell*,<sup>90</sup> where Justice Holmes declared that “[t]hree generations of imbeciles are enough,” he relied on *Jacobson*, noting that “[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.”<sup>91</sup>

### B. Privacy Laws

The Health Insurance Portability and Accountability Act of 1996,<sup>92</sup> more commonly known as HIPAA, is usually the law that is most relevant when health privacy is at issue in the United States. However, HIPAA’s rules only apply to covered entities and business associates.<sup>93</sup> Covered entities are defined as “health plans, health care clearinghouses, and . . . health care providers that transmit health information in electronic form . . . [for] standard transactions.”<sup>94</sup> Business associates are those “persons or entities that access or use protected health

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87. *Id.* at 25.

88. Wendy E. Parmet, *Rediscovering Jacobson in the Era of COVID-19*, 100 B.U. L. REV. ONLINE 117, 131 (2020) (“*Jacobson* did not and could not have affirmed the suspension of heightened standards of review for specific constitutional claims, nor did it say that the ‘traditional tiers of constitutional scrutiny did not apply.’”).

89. *Zucht v. King*, 260 U.S. 174, 175–76 (1922) (citing *Jacobson*, 197 U.S. at 25) (upholding a city’s required vaccination for school children because *Jacobson* had “[l]ong before . . . settled that it is within the police power of a state to provide for compulsory vaccination”). Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLAL. REV. 1267, 1270 (2007) (discussing how strict scrutiny arose in the 1960s to address the Warren Court’s problem of “crafting . . . formulas to protect ‘preferred’ or fundamental rights that were too important to be enforced only by a rational basis test, but that the Supreme Court could not reasonably define as wholly categorial or unyielding”).

90. 274 U.S. 200 (1927).

91. *Id.* at 207 (drawing an analogy between forced sterilization and vaccination as instances in which the balance between the common good and individual rights must tip in favor of the former).

92. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936.

93. *Id.*

94. Stacey A. Tovino, *Assumed Compliance*, 72 ALA. L. REV. 279, 282 (2020) (citing 45 C.F.R. §§ 160.102(a), 160.103); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104–191, 110 Stat. 1936.



information . . . to provide certain services to, or to perform certain functions on behalf of, covered entities.”<sup>95</sup> Thus, HIPAA leaves a huge gap as it does not “protect the privacy and security of health data collected, used, disclosed, or sold by many technology companies, online service providers, mobile health applications, and other entities and technologies that do not meet the definition of a covered entity or business associate.”<sup>96</sup>

If vaccine passports determine access to work or travel, the mobile app that houses such information and the person or company asking to see the passport receives health information about the individual who shows the passport. Namely, they know that the individual has received the vaccine(s), which can indicate that they do not have a disability or immunocompromised state that prevents vaccination. Being forced to share this information may feel like a privacy violation. However, in the United States, an individual’s privacy generally turns on which entity is collecting or retaining his or her information.<sup>97</sup> Thus, information collected by a hospital receives different privacy protections than information collected by a bank.<sup>98</sup> So, although HIPAA does not protect this medical information, there is clearly a privacy concern here,<sup>99</sup> especially because consent to provide this information may actually be akin to coercion. If a workplace requires vaccine passports, a person may feel pressured to get vaccinated and provide that information to earn a living. It is not clear that this is truly voluntary, if the choice is between sharing this information or not being able to pay rent.

In Europe, where the General Data Protection Regulation (GDPR)<sup>100</sup> provides a more far reaching and comprehensive privacy

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95. Tovino, *supra* note 94, at 282.

96. *Id.*

97. See *supra* notes 93–96 and accompanying text; see also Kristina A.K. Hickerson, Comment, *Consumer Privacy Protection: A Call for Reform in an Era of Financial Services Modernization*, 53 ADMIN. L. REV. 781, 797 (2001) (noting how HIPAA protections which apply to entities like healthcare providers do not extend to financial entities holding comparable information).

98. Hickerson, *supra* note 97, at 797.

99. See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977) (recognizing a fundamental privacy right in non-disclosure of personal medical information).

100. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation) 2016 O.J. (L. 119) 1.

law than HIPAA, some have already posited that immunity passports may be challenging to implement.<sup>101</sup> It is possible that some state laws like the California Consumer Privacy Act<sup>102</sup> (CCPA) may bring more hurdles for those companies thinking of using vaccine passports.<sup>103</sup> However, these hurdles do not seem insurmountable with adequate consent and security safeguards. Legislative proposals, such the federal Public Health Emergency Privacy Act,<sup>104</sup> are being proposed in the Senate and House because “health privacy laws have not kept pace with the privacy expectations Americans have come to expect for their sensitive health data.”<sup>105</sup> The senators who proposed the bill specifically mentioned the need for “[s]trong privacy protections for COVID health data . . . as . . . companies begin experimenting with things like ‘immunity passports’ to gate access to facilities and services.”<sup>106</sup> However, the proposed Public Health Emergency Privacy

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101. Ana Beduschi, *Immunity Passports: A Risky Solution*, DIRECTIONS BLOG (June 1, 2020), <https://directionsblog.eu/immunity-passports-a-risky-solution> [<https://perma.cc/5BA9-FCJJ>] (“[H]ealth data, such as the results of COVID-19 immunity tests, enjoy a reinforced level of protection under Article 9 of the GDPR.”).

102. CAL. CIV. CODE §§ 1798.100-1798.199 (West 2020).

103. *California Consumer Privacy Act (CCPA)*, STATE OF CAL. DEP’T OF JUST., OFF. OF THE ATT’Y GENERAL, <https://oag.ca.gov/privacy/ccpa> [<https://perma.cc/VFM7-94HJ>]; see also Joram Borenstein & Rebecca Weintraub, *Rolling out the Covid Vaccine Is a Huge IT Challenge*, HARV. BUS. REV. (Dec. 21, 2020), <https://hbr.org/2020/12/rolling-out-the-covid-vaccine-is-a-huge-it-challenge> (noting hurdles that the CCPA and other privacy laws pose to the U.S. government’s ability to access vaccination records with personal identifiers); Joseph J. Lazzarotti & Jason C. Gavejian, *Examples of COVID19 Screening, Social Distancing, and Contact Tracing Technologies and Related Legal and Practical Issues*, JACKSON LEWIS (May 11, 2020), <https://www.workplaceprivacyreport.com/2020/05/articles/covid-19/examples-of-covid19-screening-social-distancing-and-contact-tracing-technologies-and-related-legal-and-practical-issues> (surveying challenges the CCPA and other privacy laws pose to various COVID-19-related technologies, such as contact tracing).

104. Public Health Emergency Privacy Act, S. 3749, 116th Cong. (2020).

105. Press Release, Mark R. Warner, Senator, Senate, Protecting Civil Liberties During COVID-19: Warner, Blumental Eshoo Schakowsky & DelBene Introduce the Public Health Privacy Act, (May 14, 2020), <https://www.warner.senate.gov/public/index.cfm/2020/5/protecting-civil-liberties-during-covid-19-warner-blumental-eshoo-schakowsky-delbene-introduce-the-public-health-privacy-act>.

106. Steve Alder, *Public Health Emergency Privacy Act Introduced to Ensure Privacy and Security of COVID-19 Data*, HIPAA J. (Feb. 3, 2021), <https://www.hipaajournal.com/public-health-emergency-privacy-act-covid-19-data> [<https://perma.cc/C4FL-F7JF>].

Act<sup>107</sup> is not law yet, and it is not clear that there is an appetite for a federal privacy regulation for the pandemic given that it was introduced in May 2020 and never voted upon.<sup>108</sup> Thus, in terms of privacy law in the United States, the use of vaccine passports is likely not going to run afoul of any federal or state statutes. The Biden Administration has already indicated that there will be no federal vaccine passport scheme, so this article is focused on the most likely pathway that vaccine passports will promulgate in the United States: by way of private entities.<sup>109</sup> Thus, this article does not analyze federal constitutional law issues related to these vaccine passports.

### C. *Employment Related Vaccine Passports*

One common type of vaccine passport being considered would allow employers to check that their employees are vaccinated. Certain workplaces, like hospitals, already require mandatory vaccinations, subject to medical, religious, and sometimes philosophical exceptions.<sup>110</sup> Therefore, there is precedent for vaccine mandates in the workplace, subject to appropriate exceptions. However, whether such mandates would be ethical or legal in the COVID-19 context is currently untested in the courts.<sup>111</sup> Currently, the COVID-19 vaccines in the United States are authorized under an emergency use authorization and are not fully approved with two years of safety data.<sup>112</sup> At this stage, an employer

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107. S. 3749; *see also*, S.3748—*Public Health Emergency Privacy Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/3749/actions> (showing no action taken on the bill).

108. *See* S. 3749.

109. *See* Mark A. Hall & David M. Studdert, “Vaccine Passport” Certification—Policy and Ethical Considerations, *NEW ENG. J. MED.* (Mar. 31, 2021), <https://www.nejm.org/doi/full/10.1056/NEJMp2104289> [<https://perma.cc/T8MM-CZMP>].

110. *Influenza Vaccination Information for Health Care Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 28, 2021), <https://www.cdc.gov/flu/professionals/healthcareworkers.htm> [<https://perma.cc/8NUW-NPEX>]; Alexandra M. Stewart, *Using State Laws to Vaccinate the Health-Care Workforce*, 127 *PUB. HEALTH REPS.* 224, 225 (2012).

111. *See* Robin Young & Serena McMahon, *Can Employers Require Workers to Get the COVID-19 Vaccine? One Expert Says It’s Complicated*, *WBUR* (Jan. 19, 2021), <https://www.wbur.org/hereandnow/2021/01/19/employees-vaccine-requirements> [<https://perma.cc/THZ6-NZB9>].

112. Press Release, FDA, FDA Takes Additional Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for Second COVID-19 Vaccine (Dec. 18, 2020), <https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid> [<https://perma.cc/SWN3-FGGW>].

mandate may be too premature. However, in December 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance that gave employers a green light of sorts should they wish to require COVID-19 vaccinations.<sup>113</sup>

*D. The Americans With Disabilities Act*

The Americans with Disabilities Act<sup>114</sup> (ADA) protects persons with a disability and those who do not have a disability but are still “regarded as” having a disability, from discrimination in the workplace and in public areas.<sup>115</sup> The ADA defines a person with a disability as someone with “a physical or mental impairment that substantially limits one or more major life activities.”<sup>116</sup> To meet this definition, one can show that they either (1) have an actual disability, (2) a record of a disability, or (3) have no disability but are still “regarded as” having a disability.<sup>117</sup> Lack of immunity to COVID-19 may seem at first to potentially fall within the protection of the ADA’s “regarded as” physical impairment prong.

The legislative history and case law of the ADA as amended by the ADA Amendments Act<sup>118</sup> show that a plaintiff may state a case by alleging prohibited action was taken against her because she was perceived as having an impairment, even where the perceived impairment does not in fact limit a major life activity, as long as the perceived impairment is not transitory (up to six months) and minor.<sup>119</sup> Supporting such an extension of statutory interpretation to cover lack of immunity, the ADA as amended requires that it be construed in favor of broad coverage to the greatest extent permitted by the ADA.<sup>120</sup> But EEOC regulations interpreting the term “physical and mental impairments” in Title I exclude “physical characteristics . . .

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113. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/428G-LGTR>] (detailing the requirements for mandating employee vaccination).

114. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2018).

115. *Id.*

116. *Id.*

117. 28 C.F.R. § 35.108(a)(1) (2019).

118. ADA Amendments Act of 2008, Pub. L. No. 110–325, § 3, 122 Stat. 3553 (2008).

119. *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/disability-discrimination> [<https://perma.cc/RYR4-J2WH>].

120. 14 C.F.R. § 1251.100(b) (2020).

that are within ‘normal’ range and are not the result of a physiological disorder” including “characteristic predisposition to illness or disease.”<sup>121</sup> This would seem to clearly exclude lack of immunity. Lack of immunity is also at least arguably unlikely to be covered under the “regarded as” prong on the basis of a risk of future impairment, i.e., by infection, as such an impairment is not actual or perceived at the time of the action being taken.

Under the ADA, an employer is prohibited from making disability-related inquiries and requiring medical examinations of employees, with some limited exceptions.<sup>122</sup> The EEOC has stated that a vaccination itself is not a medical examination.<sup>123</sup> The EEOC considers COVID-19 “a direct threat” to the workplace, meaning that it carries “a significant risk of substantial harm” even with “reasonable accommodation.”<sup>124</sup> Therefore, employers are allowed to screen and test for COVID-19 infection, in contravention to typical non-pandemic rules, which would not generally allow an employer to inquire about an employee’s personal health information.<sup>125</sup>

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121. 29 C.F.R. § 1630.2(h) (2020).

122. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/X5RQ-5AQQ>] (“An inquiry is ‘disability-related’ if it is likely to elicit information about a disability . . . . By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability . . . . A ‘medical examination’ is a procedure or test that seeks information about an individual’s physical or mental impairments or health.”).

123. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 113.

124. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> [<https://perma.cc/WX23-GD3P>].

125. 42 U.S.C. §§ 12111(3), (8); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) (2020). There is also a question whether those without an immunity passport or vaccine passport would be discriminated against if employers required COVID-19 vaccination. The legislative history and plain language of the ADA suggest that the “regarded as” provision is intended to protect those who are not actually disabled but are treated as disabled. See Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 391 (2019) (discussing courts’ narrow construction of the ADA prior to its 2008 amendments); Jasmine E. Harris, *The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 31 (2020) (stating that it was Congress’ intent to provide more than just a “remedial” statute). Since the ADA was amended in 2008, it must be “construed in favor of broad coverage.” 42 U.S.C. § 12102(4)(A). Where a prohibited action is

In the vaccine passport context, the EEOC allows certain medical-related questions to be posed to an employee before a vaccine is given to assure that the person does not have a medical condition that makes the vaccine unsafe.<sup>126</sup> These questions could be considered “disability-related inquiries” regulated by the ADA, which employers may only ask under certain circumstances.<sup>127</sup> In particular, such inquiries must be “job-related and consistent with business necessity.” However, when an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, an employer need not make this showing.<sup>128</sup> Employers are required to accommodate those with sincerely held religious objections to vaccination, unless doing so would pose an ‘undue hardship’ under Title VII of the Civil Rights Act.<sup>129</sup> Those who have medical conditions which make getting the vaccine dangerous or otherwise inappropriate should be exempted, but may be kept away from the workplace if they pose a “direct threat.”<sup>130</sup> Under the ADA, an employer is allowed to require “that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”<sup>131</sup> The EEOC notes that an employer may determine that “an unvaccinated individual will expose others to

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taken against an individual because they are “regarded as” having a physical or mental impairment, there is no necessity that the impairment be one that limits, or is perceived to limit, a major life activity. *Id.* § 12102(3). A person who cannot receive an immunization for health reasons can point to alternative protective measures they can take, such as wearing a mask. Y. Tony Yang et al., *The Americans with Disabilities Act and Healthcare Employer-mandated Vaccinations*, 38 *VACCINE* 3184, 3185 (2020).

126. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 113.

127. *Id.*

128. *Id.*

129. *Id.*; see also *Questions and Answers: Religious Discrimination in the Workplace*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (July 22, 2008), <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> [<https://perma.cc/TF63-SE8Q>] (defining undue hardship as a “more than de minimis cost” on the employer, including non-monetary costs, such as reduced efficiency in other jobs or impaired workplace safety).

130. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, *supra* note 113.

131. *Id.* “Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.” *Id.*

the virus at the worksite.”<sup>132</sup> If one cannot be vaccinated due to disability, the employer is allowed to exclude the employee from the workplace if there is no way to provide “a reasonable accommodation . . . that would eliminate or reduce this risk” without undue hardship.<sup>133</sup>

*E. Just Because You Can Do It Does Not Mean You Should*

Thus, the law may not be a significant barrier for COVID-19 vaccine passports. For example, if a meat processing plant decides to require vaccine passports that show that COVID-19 vaccinations have been completed before its employees can return to work, it can do so. If a factory line worker employee cannot be vaccinated due to a disability and thus cannot receive a vaccine passport, the meat processing plant could conceivably fire that employee with no ADA consequences if there are no remote options or other reasonable accommodations.<sup>134</sup>

Given the fact that racial and ethnic minorities account for 87% of COVID-19 cases in meat processing plants, even though they only account for 61% of meat and poultry processing workers,<sup>135</sup> this is troubling. First, the meat processing industry lobbied to be considered an essential business during this pandemic, which meant that meat processing workers had to continue working in factories at substantial risk to themselves and their families.<sup>136</sup> Such factories ended up becoming coronavirus hotspots, and most of the employees who

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132. *Id.*

133. *Id.*

134. *See id.* (noting that, although an employer may not “*automatically* terminate [a] worker” and must first determine whether the worker is entitled to other accommodations under the law, the employer may exclude the worker from the workplace).

135. Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April-May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 888 (2020); *cf.* Shawn Fremstad et al., *Meatpacking Workers Are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL’Y RSCH. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections> [<https://perma.cc/KRG3-PHLF>] (finding that 51.5% of frontline meatpacking workers are immigrants; 44.4% are Hispanic; and 25.2% are Black).

136. Ruqaiijah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFFS. BLOG (May 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full> [<https://perma.cc/8G64-N2KG>]; Ruqaiijah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in COVID-19*, EMORY L.J. (forthcoming 2021) (manuscript at 21, 24) (on file with SSRN).

worked in such factories were immigrants and people of color.<sup>137</sup> Those employees who cannot be vaccinated due to health conditions that constitute a disability may be out of a job, even though they put themselves at risk without the benefit of a vaccine for several months. Such a result is troubling and leads to the next Part of this Article, which explores the many ethical problems with using vaccine passports.

### III. ETHICAL PITFALLS OF THESE PASSPORTS

There are significant ethical issues with the use of vaccine passports. Some scholars warn that they will exacerbate inequality, allowing those who have immunity more freedom and opportunities to work.<sup>138</sup> There is a concern that the use of these passports will encourage fraud,<sup>139</sup> allow a black market to develop,<sup>140</sup> and risk privacy.<sup>141</sup>

#### A. *Solidarity and the Slippery Slope*

Part of my wariness about the use of these passports is that the infrastructure that is created for their use can then be used for other less serious health conditions. Such passports privilege able-bodied people,<sup>142</sup> mostly white,<sup>143</sup> mostly men,<sup>144</sup> over others. Vaccine passports will allow those with such credentials to move on past this pandemic.

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137. Yearby & Mohapatra, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, *supra* note 136 (manuscript at 27–28).

138. Baylis & Kofler, *supra* note 65 (discussing how immunity passports could divide society into two unequal classes).

139. Greely, *supra* note 9 (describing how immunity passports could create incentives for fraud and black market trade because of the freedom of movement and activity they would provide).

140. *Id.*

141. Ole F. Norheim, *Protecting the Population with Immune Individuals*, 26 NATURE MED. 823, 824 (2020).

142. *See supra* notes 126–33 and accompanying text.

143. *See infra* notes 165–66 and accompanying text (detailing how Black and Hispanic Americans have gotten vaccinated at a rate much lower than their rate of infection and death).

144. *See* Esha Bhandari & ReNika Moore, *Coronavirus 'Immunity Passports' Are Not the Answer*, ACLU (May 18, 2020), <https://www.aclu.org/news/privacy-technology/coronavirus-immunity-passports-are-not-the-answer> [<https://perma.cc/AA9X-F4PB>]; Phelan, *supra* note 9, at 1596 (discussing how immunity passports might create perverse incentives to seek out infection and compound existing gender inequalities).



This pandemic has harmed Black,<sup>145</sup> Latino,<sup>146</sup> indigenous,<sup>147</sup> elderly living in congregate care communities such as long-term care facilities<sup>148</sup> and jails,<sup>149</sup> and disabled people significantly.<sup>150</sup> The response to COVID-19 requires solidarity with all of these populations. I worry that vaccine passports and immunity passports will fracture communal spirit at a time when it is most needed. If such passports become a reality, it will be difficult to limit their use to narrow purposes. Around the world, people have been making sacrifices, such as staying home, working from home, homeschooling their children, and wearing masks, for the greater good. There is a real concern that these passports will make those who qualify for them abandon these efforts and fracture this communal spirit. Whereas testing for active infection or symptoms would restrict individuals only while their infections are contagious, immunity and vaccine passports would divide people into two classes. The immune class would be preferred over the non-immune whenever possible, as in hiring.<sup>151</sup>

### B. Policing

Another concern is how these passports will be policed. For example, in New York, social distancing rules have been enforced unevenly,

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145. Gregorio A. Millett et al., *Assessing Differential Impacts of COVID-19 on Black Communities*, 47 ANNALS OF EPIDEMIOLOGY 37, 40 (2020) (finding that even though only “one in five U.S. counties are disproportionately [B]lack . . . they accounted for five of ten COVID-19 diagnoses and nearly six of ten COVID-19 deaths nationally”).

146. Carlos E. Rodriguez-Diaz et al., *Risk for Covid-19 Infection and Death Among Latinos in the United States: Examining Heterogeneity in Transmission Dynamics*, 52 ANNALS OF EPIDEMIOLOGY 46, 50 (2020) (finding that Latino counties accounted for a disproportionate share of COVID cases and deaths across the nation).

147. Jessica Arrazola et al., *COVID-19 Mortality Among American Indian and Alaska Native Persons—14 States, January-June 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1853, 1854 (2020) (finding that the COVID-19 mortality rate among indigenous populations was significantly higher than the mortality rate among the white population).

148. Suparna Bagchi et al., *Rates of COVID-19 Among Residents and Staff Members in Nursing Homes—United States, May 25–November 22, 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 52, 55 (2021).

149. Madeleine Carlisle & Josiah Bates, *With over 275,000 Infections and 1,700 Deaths, COVID-19 Has Devastated the U.S. Prison and Jail Population*, TIME (Dec. 28, 2020, 2:52 PM), <https://time.com/5924211/coronavirus-outbreaks-prisons-jails-vaccines> [<https://perma.cc/D8NA-VYLD>].

150. See Harris, *supra* note 125, at 32, 34 (listing examples of states discriminating against disabled populations in their ventilator and ICU bed rationing plans).

151. Bhandari & Moore, *supra* note 144.

targeting a higher percentage of Black people.<sup>152</sup> There is reason to be worried that this will add another layer of disadvantage to the Black community, which has already faced disproportionate rates of COVID-19 death and infection.<sup>153</sup> These passports could promote greater surveillance of people's lives by employers and governments, make vaccination-induced immunity a condition of access to travel, housing, and public accommodations, and disproportionately impact populations that have already been devastated by the pandemic.

### C. Fairness and Vaccine Passports

In order for vaccine passports to be ethical, everyone must have access to a vaccine. As of April 19, 2021, every person over sixteen is eligible for a COVID-19 vaccine. During the first few months after the vaccines were authorized, states were vaccinating people based on their own plans.<sup>154</sup> Each state and territory had devised its own vaccine allocation plan.<sup>155</sup> The CDC Advisory Committee on Immunization Practice (ACIP) suggested which population groups should receive Covid-19 vaccines first.<sup>156</sup> One of ACIP's goals for its allocation strategies was to "aim to both reduce existing disparities and to not create new disparities."<sup>157</sup> Although ACIP proposed categories of those who should receive vaccines first, like health care providers, people in long term care facilities, and then those over seventy-five years of age, the CDC ACIP recommendations were ignored by states.<sup>158</sup> There was

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152. Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html>.

153. Millett et al., *supra* note 145, at 40; see also *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTR. DISEASE CONTROL & PREVENTION (Feb. 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [<https://perma.cc/UAT2-3F33>].

154. Harald Schmidt et al., *Equitable Allocation of COVID-19 Vaccines: An Analysis of the Initial Allocation Plans of CDC's Jurisdictions with Implications for Disparate Impact Monitoring 2* (2020) (unpublished) (on file with SSRN), <https://papers.ssrn.com/abstract=3740041>.

155. *Id.*

156. *Id.*

157. Nancy McClung et al., *The Advisory Committee on Immunization Practices' Ethical Principles for Allocating Initial Supplies of COVID-19 Vaccine—United States, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1782, 1783 (2020).

158. See *id.* at 1782 (noting that ACIP's guidelines are meant to assist states in their own decision making and are not binding); Jack Brewster, *Here Are the States Breaking from CDC Guidelines on Vaccine Priority*, FORBES (Dec. 24, 2020, 2:55 PM),

not any consistent approach as to who was getting vaccinated in different states when the vaccinations were initially distributed. Florida, for example, started vaccinating all those over sixty-five before essential workers, even though that was in direct contravention of CDC advice.<sup>159</sup> Many states did not prioritize essential workers or people with disabilities or certain health conditions. Prioritization like this ignores the fact that people with disabilities and chronic illness face increased risk of death and serious complications with COVID-19.<sup>160</sup> In fact, states like Florida and Texas are switching to criteria in which advanced age is the primary determinant of priority instead of prioritizing essential workers or people with disabilities or certain health conditions.<sup>161</sup> Additionally, Black people have a lower life expectancy than white people, so fewer Black people are in the older age ranges.<sup>162</sup> Initial vaccination plans were skewed towards those who are white and able-bodied. There is an ethical problem with using these passports to further disadvantage these populations who are already suffering the burdens from the pandemic.

Even though scarcity is likely not an issue in COVID-19 vaccinations any longer, for medical and disability reasons, there are certain people who will not be able to be vaccinated. Additionally, there are people with disabilities and other homebound individuals who may wish to get vaccinated but are not able to get to a vaccination site. It is unfair to

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<https://www.forbes.com/sites/jackbrewster/2020/12/24/here-are-the-states-breaking-from-cdc-guidelines-on-vaccine-priority/?sh=755dca03804a> [<https://perma.cc/4KNV-F8KN>] (listing which states have deviated from ACIP recommendations and how they have done so).

159. Isaac Stanley-Becker, *Some States Buck Federal Vaccine Recommendations and Prioritize the Elderly over Essential Workers*, WASH. POST (Dec. 29, 2020, 6:00 PM), <https://www.washingtonpost.com/health/2020/12/29/covid-vaccine-priority-group-elderly>. Although outside the scope of this essay, it is important to note that some have suggested that vaccines be allocated more equitably by using a form of disadvantage index. See Schmidt et al., *supra* note 154, at 4. Very few states have incorporated such analysis.

160. See *People with Certain Medical Conditions*, CTR. DISEASE CONTROL & PREVENTION (Mar. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/FZG3-EDZF>].

161. Stanley-Becker, *supra* note 159.

162. Wendi C. Thomas & Hannah Grabenstein, *People over 75 Are First in Line to Be Vaccinated Against COVID-19. The Average Black Person Here Doesn't Live that Long*, PROPUBLICA (Feb. 12, 2021, 11:30 AM), <https://www.propublica.org/article/people-over-75-are-first-in-line-to-be-vaccinated-against-covid-19-the-average-black-person-doesnt-live-that-long> [<https://perma.cc/UYC5-NBSK>].

these people if, because of their physical conditions, they are denied privileges afforded to those who are able-bodied.

Additionally, although this Article is focused on the United States, it is important to situate the United States in the global context. There are entire countries who will have less or no access to vaccinations due to the fact that many countries do not have the financial ability to purchase vaccines.<sup>163</sup> Due to vaccine nationalism, some rich countries are hoarding vaccines for themselves and not sharing the technology or know-how with poorer countries.<sup>164</sup> Given the fact that the COVID-19 pandemic itself shows how a virus that originated in Wuhan, China can cause global havoc, not ensuring global access to vaccines is similarly foolish. We will see the same issue with vaccinations. Unless the entire world is given access to vaccinations, we will not see the end of the pandemic.

#### *D. Structural Discrimination and Vaccine Passports*

Even if anyone who wishes to have a COVID-19 vaccine will have access to it, there is a concern that Black Americans will not be vaccinated at the same rates as they are suffering from COVID-19. We are already seeing great disparities in vaccine rates. For example, Black Mississippians account for 38% of COVID-19 cases and 42% of deaths in the state but have only received 15% of vaccinations.<sup>165</sup> Likewise, Hispanic Texans represent 44% of cases and nearly half of the deaths in the state but make up a mere 15% of those who have been vaccinated.<sup>166</sup> These differences suggest that the problem goes beyond vaccine hesitancy, and that there is a problem with access to online

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163. Ashleigh Furlong, *Why 'Equal Access' to Coronavirus Vaccines Is Failing Poor Countries*, POLITICO (Feb. 24, 2021), <https://www.politico.eu/article/coronavirus-vaccines-poor-countries-equal-access> [<https://perma.cc/257Z-UGU5>].

164. Stephen Cockburn, *To Stop the Global Pandemic, Rich Countries Need to Stop Hoarding Vaccines*, CNN (Feb. 12, 2021, 8:54 AM), <https://www.cnn.com/2021/02/12/perspectives/vaccine-hoarding-eu-uk-africa/index.html> [<https://perma.cc/R9GF-NGNS>].

165. Nambi Ndugga et al., *Early State Vaccination Data Raise Warning Flags for Racial Equity*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/policy-watch/early-state-vaccination-data-raise-warning-flags-racial-equity> [<https://perma.cc/W22A-6E44>]; Ari Shapiro, *Early Data Shows Striking Racial Disparities in Who's Getting the COVID-19 Vaccine*, NAT'L PUB. RADIO (Jan. 28, 2021, 6:21 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/01/28/961703505/early-data-shows-striking-racial-disparities-in-whos-getting-the-covid-19-vaccin> [<https://perma.cc/U2K5-HVUC>].

166. Shapiro, *supra* note 165; *see also* Ndugga et al., *supra* note 165 (discussing disparities in vaccination rates among Hispanics in several states).

vaccination appointment system and access to physical vaccination sites.<sup>167</sup> Teck Chuan Voo and his team have suggested that “ill-conceived policies have the potential to cause severe unintended harms that could result in greater inequity, the stigmatization of certain sectors of society, and heightened risks and unequal treatment of individuals.”<sup>168</sup>

In a survey-based study, less than half of Black and 66% of Latino respondents said they would definitely or probably take the COVID-19 vaccine if it was offered for free, underscoring the challenge of vaccinating those communities hit hardest by the pandemic.<sup>169</sup> “14 percent of Black people trust that a vaccine will be safe, and 18 percent trust that it will be effective in shielding them from the coronavirus. Among Latinos, 34 percent trust its safety, and 40 percent trust its effectiveness.”<sup>170</sup>

Given the historical injustices that the Black community has faced in the name of public health, this is not surprising. Especially for the older generation, the shadow of the Tuskegee Syphilis Study is ever-present.<sup>171</sup> In the study, Black men with syphilis were just watched and not provided treatment (even when a treatment was readily available) without their knowledge or consent.<sup>172</sup> But there are many examples beyond Tuskegee. Another historical assault is the experimentation without anesthesia or consent on enslaved women by Marion Sims, the so-called father of gynecology, who had beliefs that Black women did not feel pain.<sup>173</sup> Decades of forced sterilization of Black women and

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167. Govind Persad, *Allocating Medicine Fairly in an Unfair Pandemic*, U. ILL. L. REV. (forthcoming 2021) (manuscript at 105) (on file with SSRN).

168. Teck Chuan Voo et al., *Ethical Implementation of Immunity Passports During the COVID-19 Pandemic*, 222 J. INFECTIOUS DISEASES 715, 717 (2020).

169. LANGER RESEARCH ASSOCIATES, COVID COLLABORATIVE SURVEY: CORONAVIRUS VACCINE HESITANCY IN BLACK AND LATINX COMMUNITIES 2 (2020), <https://www.covidcollaborative.us/content/vaccine-treatments/coronavirus-vaccine-hesitancy-in-black-and-latinox-communities>; see also William Wan, *Coronavirus Vaccines Face Trust Gap in Black and Latino Communities, Study Finds*, WASH. POST (Nov. 23, 2020, 7:55 PM), <https://www.washingtonpost.com/health/2020/11/23/covid-vaccine-hesitancy>.

170. Wan, *supra* note 169.

171. Debbie Elliott, *In Tuskegee, Painful History Shadows Efforts to Vaccinate African Americans*, NAT'L PUB. RADIO (Feb. 16, 2021, 5:00 AM), <https://www.npr.org/2021/02/16/967011614/in-tuskegee-painful-history-shadows-efforts-to-vaccinate-african-americans> [<https://perma.cc/J78W-SZRS>].

172. *Id.*

173. Camila Domonoske, *Father of Gynecology, 'Who Experimented on Slaves, No Longer on Pedestal in NYC*, NAT'L PUB. RADIO (Apr. 17, 2018, 1:39 PM), <https://www.npr.org/sections/thetwo>

people with disabilities in this country is yet another example.<sup>174</sup> Even beyond these shocking examples, is the biased health care delivery system that has left many Black people behind, with poor health care services, with physicians who are not from their community, and without access to health care facilities.<sup>175</sup> With this backdrop, it would be surprising if Black people actually did trust public health or government health efforts. Any kind of passport scheme that allows people who are vaccinated to have more rights than those who are not vaccinated needs to take account of this historical truth and make efforts at properly addressing earned distrust of the health care system by members of the Black community.

Another ethical problem with using vaccine passports is that access to vaccination has not been equally distributed in this country.<sup>176</sup> The same inequities that resulted in COVID-19 disproportionately affecting Black, Latino, and indigenous populations are playing out in the vaccine rollout. As of this writing, Black and Latino people have received fewer vaccinations relative to their proportion of the population and a disproportionate share of COVID-19 deaths in most reporting states.<sup>177</sup> For example, in Nebraska, the Latino population has received 4% of Nebraska's vaccinations, though they suffer from 23% of COVID-19 cases and 13% of COVID-19 related deaths.<sup>178</sup> In contrast, white people receive larger than their share of vaccinations. One example is Maryland, where 65% of vaccinations have gone to

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way/2018/04/17/603163394/-father-of-gynecology-who-experimented-on-slaves-no-longer-on-pedestal-in-nyc [https://perma.cc/3F3J-NM69]. *But cf.* L. Lewis Wall, *The Controversial Dr. J. Marion Sims (1813–1883)*, 31 INT'L UROGYNECOLOGY J. 1299, 1302 (2020) (noting that, because no effective treatment for fistulas existed at the time, experimental treatment was the only treatment option available to Sims' enslaved patients and that, when Sims began his experiments, ether anesthesia had not yet been discovered).

174. See Lisa Ko, *Unwanted Sterilization and Eugenics Programs in the United States*, PBS (Jan. 29, 2016), <https://www.pbs.org/independentlens/blog/unwanted-sterilization-and-eugenics-programs-in-the-united-states> [https://perma.cc/3PUJ-VYCZ].

175. For a comprehensive database of reports covering disparities throughout the health care system, see *Reducing Disparities in Health Care*, AM. MED. ASS'N, <https://www.ama-assn.org/delivering-care/patient-support-advocacy/reducing-disparities-health-care> [https://perma.cc/7XM6-PD4L].

176. See Peng-jun Lu et al., *Racial and Ethnic Disparities in Vaccination Coverage among Adult Populations in the U.S.*, 49 AM. J. PREVENTATIVE MED. S412, S416 tbl.2 (2015) (discussing disparities in pneumonia, influenza, tetanus, and HPV vaccines).

177. Ndugga et al., *supra* note 165.

178. *Id.*

white people, even though they represent only 39% of cases and 50% of deaths.<sup>179</sup>

Even as more vaccines are developed and there are surpluses of vaccines, it is likely that people who live in certain areas that are more racially segregated or in health care deserts, such as rural areas and certain urban areas, will not have easy access to vaccination. Also, in order to have people take the vaccine, we need to ensure that necessary supports are provided. The Moderna and Pfizer vaccines are a two vaccine series, and many people have moderate to severe reactions to these vaccines.<sup>180</sup> They are not dangerous but involve malaise, fever, and headache, symptoms that make it difficult to work.<sup>181</sup> In a country where many hourly workers and low wage workers do not have sick leave and rely on each paycheck to pay for expenses such as food and rent,<sup>182</sup> the access and equity problems with vaccines go beyond distrust. There are practical reasons why some people may decide not to get the vaccine, like not being able to afford taking a day or two off work without pay. This disproportionately affects people of color who are more likely to work in jobs without paid sick leave in the United States.<sup>183</sup>

#### IV. THE JOURNEY TO HEALTH JUSTICE

Vaccination is a social good, but in light of the inequitable access and uptake of vaccinations, using vaccine passports amounts to a social ill. If employers want to encourage vaccination amongst their employees, rather than mandates like vaccine passports, providing incentives for their employees may be a more effective and just move. For example, providing monetary payment for their expenses to go to a vaccination site, hosting a vaccination clinic at the workplace, and providing sick leave for those who feel sick after vaccinations is likely

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179. *Id.*

180. *COVID-19 What to Expect After Getting a COVID-19 Vaccine*, CTR. DISEASE CONTROL & PREVENTION (Feb. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/expect/after.html> [<https://perma.cc/H6TZ-KA2V>].

181. *See id.*

182. *See* Robert Reich, *Almost 80% of US Workers Live Paycheck to Paycheck. Here's Why*, GUARDIAN (July 29, 2018, 6:00 PM), <https://www.theguardian.com/commentisfree/2018/jul/29/us-economy-workers-paycheck-robert-reich> [<https://perma.cc/C254-2GLR>].

183. Ann P. Bartel et al., *Racial and Ethnic Disparities in Access to and Use of Paid Family and Medical Leave: Evidence from Four Nationally Representative Datasets*, MONTHLY LAB. REV. (Jan. 2019), <https://www.bls.gov/opub/mlr/2019/article/racial-and-ethnic-disparities-in-access-to-and-use-of-paid-family-and-medical-leave.htm> [<https://perma.cc/8Q3S-3MTM>].

to make it more probable that people will become vaccinated. Additionally, in general, focus needs to be given to bringing vaccinations to people within their communities at accessible sites like places of worship or via mobile vans. Also, recruiting vaccinators and liaisons from within the community is more likely to ensure some buy in.

Vaccine passports are a temporary, and potentially unreliable, fix for COVID-related problems. However, we need to focus on what can be done to address the inequities that COVID-19 has unearthed. For those of us who have been thinking about health equity for a long time, none of the disparities are shocking. However, the pandemic has aggravated existing inequities that many Americans face, including the frequent absence of sick leave or childcare, and fostered previously unimagined disparities, such as disproportionate risks of infection and devastating short- and long-term health effects. These are the structural issues that need to be addressed. Vaccine passports are actually not fixes at all, as they stand to exacerbate inequities in our society. It would be patently unfair for those people who have been impacted the most from the pandemic to also benefit the least from schemes that allow more freedom from restrictions and other benefits.

In many ways, legal and policy responses to past pandemics and this current pandemic ignore racial inequities.<sup>184</sup> For example, legal and policy actions taken to shut down certain sectors and allow other sectors to continue is a decision that harms racial minorities. Only 16.2% of Latinos and 19.7% of Black people have jobs that they

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184. See Ruqaiijah Yearby, *Structural Racism and Health Disparities: Reconfiguring the Social Determinants of Health Framework to Include the Root Cause*, 48 J.L. MED. & ETHICS 518, 520 (2020) (arguing that policy solutions such as stay at home orders and social distancing ignore the realities of many low-income and minority communities); Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 1, 2–3 (2020) (arguing that structural discrimination in housing, employment, and health care can explain the disparities in COVID-19 infection and death rates); Philip Blumenshine et al., *Pandemic Influenza Planning in the United States from a Health Disparities Perspective*, 14 EMERGING INFECTIOUS DISEASES 709, 709–10 (2008); Supriya Kumar et al., *The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence During the 2009 H1N1 Pandemic*, 102 AM. J. PUB. HEALTH 134, 134, 135–39 (2012); Monica Schoch-Spana et al., *Stigma, Health Disparities, and the 2009 H1N1 Influenza Pandemic: How to Protect Latino Farmworkers in Future Health Emergencies*, 8 BIOSECURITY & BIOTERRORISM: BIODEFENSE STRATEGY, PRAC., & SCI. 243, 248–49 (2010) (tracing the impact of H1N1 in migrant farmworker communities).



perform from home.<sup>185</sup> Thus, these groups are put at more risk while others are able to escape some risks of disease spread in the workplace. The decision not to provide or mandate certain personal protective equipment or not to enforce workplace protections harms racial minorities that are facing the risks of COVID-19 by working in person.<sup>186</sup> The health justice framework provides a way forward to empower the communities impacted by systemic racism to achieve health equity, so that “every person has the opportunity to attain his or her full health potential and no one is disadvantaged from achieving this potential because of social position or other socially determined circumstances.”<sup>187</sup> The three principles of health justice (structural change, supports, and community engagement) would be a much wiser focus than passports of privilege.<sup>188</sup> To address the problem of systemic racism in the government’s COVID-19 response, the government should adopt the health justice framework, which requires not only protection from harm, but also affirmative actions to provide material and institutional support to address racial inequities in COVID-19 infections and deaths.<sup>189</sup> The framework includes three broad principles that are structural, supportive, and empowering to prevent and eliminate racial inequities during and after the COVID-19 pandemic.<sup>190</sup>

It may be a more productive exercise for employers to incentivize their workforce to be vaccinated against COVID-19 by providing vaccines.

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185. Elise Gould & Heidi Shierholz, *Not Everybody Can Work from Home: Black and Hispanic Workers Are Much Less Likely to Be Able to Telework*, ECON. POL’Y INST.: WORKING ECON. BLOG (Mar. 19, 2020, 1:15 PM), <https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home> [<https://perma.cc/FXH3-YSJM>].

186. LISA DUBAY ET AL., URB. INST., HOW RISK OF EXPOSURE TO THE CORONAVIRUS AT WORK VARIES BY RACE AND ETHNICITY AND HOW TO PROTECT THE HEALTH AND WELL-BEING OF WORKERS AND THEIR FAMILIES 13–14, 17 (2020).

187. *Health Equity*, CTR. DISEASE CONTROL & PREVENTION (Mar. 11, 2020), <https://www.cdc.gov/chronicdisease/healthequity/index.htm> [<https://perma.cc/78N2-5TP5>] (internal quotation marks omitted).

188. Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y, L., & ETHICS 122, 122 (2020).

189. *Id.* at 127–29.

190. *See id.* at 122. I have discussed the tenets and promise of the health justice framework elsewhere. *See* Ruqaijah Yearby & Seema Mohapatra, *Systemic Racism, the Government’s Pandemic Response, and Racial Inequities in COVID-19*, EMORY L.J. (forthcoming 2021).

## CONCLUSION

Indigenous, Black, and Latino populations have been disproportionately infected, hospitalized, and died with COVID-19.<sup>191</sup> These populations are also less likely to have adequate access to COVID-19 vaccines and have justified distrust of the medical system due to structural discrimination.<sup>192</sup> This was especially the case when vaccinations were scarce goods.<sup>193</sup> Predictably, there has been great disparity in who gets vaccinated in the first few months of the rollout.<sup>194</sup> Because now COVID-19 vaccines are currently widely available to adults in the United States, there may be a good case to be made for mandatory vaccinations for certain workplaces (such as hospitals), subject to exceptions for health or disability reasons. However, using immunity as a means to control who can gain access to other workplaces or who can travel is a bad idea. The focus on vaccine passports ignores the many people who cannot get the vaccine due to their work hours, their health, and their experiences with the health care system. Rather than focusing on passports as a technological fix to lockdowns, time, money, and energy should focus on measures that bolster health justice. Just because vaccines are available does not mean that they are accessible. States need to make sure they set up neighborhood, place-based vaccination efforts. There needs to be support for time off and sick leave for vaccinations, as well as efforts to bolster education about the vaccine with trained, trusted community health workers. The focus should be to immediately lower numbers by using tried and true public health tools such as testing, contact tracing, and support for people to isolate, and longer-term measures that focus on addressing the social determinants of health, such as paid sick leave, universal health care,

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191. Nicole Chavez & Jacqueline Howard, *Covid-19 Is Sending Black, Latino and Native American People to the Hospital at About 4 Times the Rate of Others*, CNN (Nov. 16, 2020, 9:04 PM), <https://www.cnn.com/2020/11/16/health/cdc-black-hispanic-native-american-coronavirus-hospitalizations/index.html> [<https://perma.cc/7VPA-YYZN>].

192. Hannah Recht & Lauren Weber, *Black Americans Are Getting COVID Vaccines at Lower Rates than White Americans*, SCI. AM. (Jan. 20, 2021), <https://www.scientificamerican.com/article/black-americans-are-getting-covid-vaccines-at-lower-rates-than-white-americans> [<https://perma.cc/EKA7-NKGM>].

193. See Monica E. Peek et al., *COVID-19 Among African Americans: An Action Plan for Mitigating Disparities*, 111 AM. J. PUB. HEALTH 286, 289 (2021) (noting that the allocation of scarce health care resources can have a heightened effect on communities of color and further undermine the Black community's trust of doctors).

194. Recht & Weber, *supra* note 192.

and financial support for housing and education. Although such a focus is more time-consuming and expensive than short-term fixes such as immunity and vaccine passports,<sup>195</sup> the pay-off will be a more equitable future.

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195. Compare Sydney Lumpkin, *Prices for COVID-19 Vaccines Are Starting to Come into Focus*, NAT'L PUB. RADIO (Aug. 6, 2020, 4:32 PM), <https://www.npr.org/sections/health-shots/2020/08/06/899869278/prices-for-covid-19-vaccines-are-starting-to-come-into-focus> [<https://perma.cc/A4PZ-L69T>] (noting that Moderna won a U.S. government contract for \$483 million, which could ultimately be worth \$1 billion, to research and develop its vaccine while Pfizer-BioNTech's agreement with the U.S. government is for \$1.95 billion) with CONG. BUDGET OFF., THE EFFECTS OF PANDEMIC-RELATED LEGISLATION ON OUTPUT 1–3 (2020) (discussing four pieces of legislation, enacted in response to the COVID-19 pandemic, requiring employers to grant paid sick leave, provide loans to businesses, and increase financial support for housing and education, among other things, but which are estimated to add \$2.3 trillion to the federal deficit in fiscal year 2020).