

# Government-Mandated Healthcare: Halakha and Social Policy

*By Chaim Apfel*

## **I. Introduction:**

The role that governments have played in caring for the level of public health has changed dramatically over the course of the twentieth century worldwide. In the United States this role has recently undergone a dramatic change with the passage of the Patient Protection and Affordable Care Act as well as the Healthcare and Education Affordability Act. With all of these changes, many of the policies that were debated touched upon legal issues that have existed for thousands of years across many civilizations. It would be useful to compare how these issues were treated according to Jewish laws and values.<sup>1</sup> The purpose of this paper is to explain what ethical rules should govern a government healthcare plan and to explain how such a plan should be implemented.

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<sup>1</sup> Please note that this article does not reflect on any legal ramifications regarding American Healthcare Law. It is merely a thought exercise to apply halakha to this important issue.

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## II. Two Distinct Biblical Commandments for Charity

Arguably, the most fundamental ethical issue that the statute addresses is to what extent individuals can be compelled to provide for their poor. The Biblical law mandating charity can be found in two locations. The first section addresses society's reaction to abject poverty. "If your brother becomes impoverished and his means falter in your proximity, you shall strengthen him so that he shall live with you."<sup>2</sup> What form of strengthening is required by this verse? What standard of comfort is contemplated by the words, "so that he shall live with you"? An inference can be made from the next verse. The Torah uses language very similar to the above verse after listing a prohibition against profiting via loan interests at the expense of another Jew. The verse reads: "and let your brother *live with you*."<sup>3</sup> This commandment compels society to provide resources to enable a person in trouble to recover. It can be inferred that people are not considered to be "living" within a certain community if they are in financially inferior situation to those around them. The context of the term with regard to a debtor implies that the goal of enabling "living" cannot simply refer to physical vitality. The "living" standard is a characteristic of the social relationship between poor person and the donators. Apparently, this verse regards financial assistance as enabling the sort of living within this social context. However, even with the financial resources provided for the person's physical needs, they will not be regarded to be living if the donors are collecting interest on the debt. From the juxtaposition of these verses, it can be

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2 Leviticus 25:35

3 Leviticus 25:36

confirmed that society is to take steps that actively enable the peasant to recover to a state of financial stability as was contemplated in the first verse.<sup>4</sup> The goal of this verse is for society to set up a system that allows a destitute individual to live a self-empowered lifestyle free from being financially subservient to others.

More can be gleaned from the *mitzvat aseh* (positive commandment) of charitable giving by comparing it to the second source for charitable giving, the *lo taaseh* (negative commandment) of miserliness. The context of the *lo taaseh* appears after a discussion on the loan nullification imposed by the laws of *shmittah*.<sup>5</sup> The prospect of having all loans nullified would naturally cause people to be more reticent to share their resources with others. The Torah first applies a prohibition against any manifestations of miserliness: “you shall not harden your heart or close your hand against your destitute brother.”<sup>6</sup> Then it issues a compulsory statement to provide your available resources to those who lack them: “Rather, you shall open your hand to him; you shall lend him his requirement, whatever is lacking to him.”<sup>7</sup> The Torah next requires the dispelling of thoughts to withhold funds; rather, one should willfully give based on the verse “You shall surely give to him and let your heart not feel bad in this matter...”<sup>8</sup> Here the context is a poor

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4 See Rashi in Ketubot 15b, who notes that the responsibility mentioned in this verse falls on the *beis din*. *Beis din* is often the representative to carry out a communal responsibility. See Horayot 3b.

5 The verse describes a period that occurs every seven years in which all loans are remitted. The verse calls the remission a *shmittah*. See Deuteronomy 15:1-3.

6 Deuteronomy 15:7

7 Deuteronomy 15:8

8 Deuteronomy 15:10

person that is in some financial hardship and in need of something specific. Society is warned against turning away from such a person.

### III. Practical Distinctions Between the Two Types

Maimonides applies the positive and negative commandments to two different types of needy individuals. The first form of charity, compelled by the *mitzvat aseh*, which specifies help for the “impoverished,” is prescribed for the classically poor – namely, those who are in particularly dire straits from a lack of funds.<sup>9</sup> The second form of charity does not address a particular level of poverty. The person needing help could normally have the resources to be self-supportive, but he simply needs some specific resource, even if only a loan. Maimonides uses the negative commandment to address helping this person.<sup>10</sup> The person need not actually be poor to qualify; he must just lack the means to accumulate additional funds for something that he needs.<sup>11</sup>

A second distinction between the *aseh* and the *lo taaseh* is the degree that one is required to alleviate the person in need. The Biblical language of the *mitzvat aseh* appears to require a more limited donation. It only requires that society give this poor person enough to “be strengthened.” There is no specific financial goal that would have to be met. In theory, this could be a small sum of money. The *lo taaseh*, however, forbids denying a person in need of specific help, whatever that may be. In addition, the scope

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9 Matnos Aniyim 7:1

10 See Matnos Aniyim 7:3

11 See *ibid.*

of funding for the two situations is also different. The *mitzvat aseh* can be fulfilled by donations towards anything, while the *lo taaseh* requires that the funds be provided for a specific need.

One explanation for the distinction between the two recipients of charity can be viewed as didactic. The Torah states the purpose in the first case of charity by writing: “so that he will live with you.” Maimonides interprets enabling life as a public policy that focuses on charitable giving with the goal of revitalization to a productive lifestyle, rather than simply making resources available for their consumption.<sup>12</sup> Providing all of the resources that a person needs does not encourage him to seek ways of making himself productive. He may have all that he needs to survive but he is not “living.” Society is compelled to give in such a way that the person is “strengthened” sufficiently to enable his own recovery. In contrast, the *lo taaseh* does not address a person who is destitute and has no ability of self-providing. At this moment the person needs help, but in general he is perfectly capable of living a productive life. The primary policy goal stated here is to avoid instituting a culture of miserliness. The Jewish people should not have an inclination to refrain from assisting those who are in dire need. Therefore, the Jewish community should provide to the extent that it is able to address the person’s immediate needs.

The obligation to provide help as a goal in and of itself is obviously of supreme importance. In the context of providing healthcare, the burden is even greater because the safety of a life is involved. In this context, the charity

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12 See Matnos Aniyim 10:7

that would most often apply would arguably fit under the *lo taaseh* of providing for a specific purpose. The primary concern then is to prevent any miserly urge in the community. There should be no concern that a system must ensure that the needy individuals must be able to provide for themselves.

#### **IV. Communal Obligations**

Practical concerns with implementing a social policy are different than imposing obligations on individuals to address specific needs. To what extent a community can compel its individual members to contribute towards a public welfare system is confined to the power the conglomerate has over the private property of its constituents. Questions arise over what kinds of medical care should be provided, when should it be provided, how much should be spent on providing the healthcare, who should be the ones determining when and where it should be provided, etc. These concerns are different from the ones that an individual has to deal with. Communal policy needs to anticipate the ways funds are allocated before there is a need. It also needs to take into account the impact upon the population. Jewish law guides us as to what a communal policy should look like.

Analysis of the rights the community has over the individual can be guided based on two sources that deal with issues relating to society's responsibility to provide for the safety of individuals at the expense of the community. The Talmud states that a town is not permitted to ransom individuals for more than they are deemed to be worth. The reason for this harsh measure is out of concern "for the welfare of society".<sup>13</sup>

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13 Gittin 45a

In general, redeeming captives is considered one of the highest priorities in Jewish law along with saving a life.<sup>14</sup> Two explanations are offered in the Talmud to explain the Talmud's limitation on redeeming prisoners. The first explanation is that the community should not be impoverished in order to provide for the needs of individuals. The second explanation is that the community would be put in even greater danger of further kidnappings if the perpetrators realized that they could receive exorbitant ransoms.<sup>15</sup>

The difference between the two explanations is whether an individual acting on his own accord could pay to redeem the captive. According to the first explanation, there would be no problem with an individual assuming the burden of paying the cost. The individual is using privately owned resources, and therefore, there would be no problem for that individual to spend the money. Any future possible danger that might occur to the community as a result of the individual's decision does not override the right of individuals to save someone they care about. According to the second viewpoint, the needs of society would take precedence over the needs of the individual. Under these considerations, an individual would not be allowed to infringe upon society's overall safety. Clearly, a citizen has to take into account the needs of the community when it comes to using even one's own private financial resources.<sup>16</sup>

It might seem intuitive that the needs of the few should

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14 Shulchan Aruch Yoreh Deah 252:1

15 Ibid.

16 Steinberg, Avraham. *Encyclopedia of Jewish Medical Ethics*. Feldheim Publishers. (2009) vol 1. (citing Rif and Rosh of Ketuboth 52a s.v. vahayu; Tosafot, Gittin 45a sv. Delo; Maimonides *Ishut* 14:19; Tur, Shulchan Aruch Even Ha'Ezer 78:2 and Ramah ad loc.)

be superseded by the needs of the many. However, our capitalistic system is run under the premise that private individuals have rights that cannot be infringed upon. Jewish law states that a great need does not give a person a right to use another person's property without paying for it.<sup>17</sup> Not every individual has the right to determine how best to use available resources. Communities have the right to suspend the rights of individuals through a process akin to eminent domain. For example, the Talmud records that King David asked the Sanhedrin whether he was allowed to burn down private fields in which Philistine enemies were launching attacks. The Court answered: "[i]t is forbidden to rescue oneself through the destruction of another's property; you, however are king, and a king may break [through privately owned fields] and no one is entitled to prevent him from doing so."<sup>18</sup> Tosafot explain that King David's concern was not whether he was permitted to actually use the property, since that would obviously be permitted because it would be saving Jewish lives. The question was whether the king would have to repay the owner. According to Tosafot, the king was allowed to eliminate the property of the field owner for his needs.<sup>19</sup> The king as the leader represents the voice of the community. The extent to which communal needs

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17 Baba Kama 117b. Note that the Talmud exempts a person from having to pay damage caused to another person's property while saving a different person. The Talmud cautions that under a strict application of the law, this is not the appropriate outcome. However, it enacts this rule in order to prevent individuals from hesitating from saving other people. The rule is applied to someone who actually sees a person in clear and present danger. It would not be applicable to addressing a prevalent but not extant threat, like social healthcare systems are meant to address.

18 Baba Kama 60b

19 Ad loc sv mahu; also see Rashi sv vayatzilah holding that it is forbidden to save oneself with the money of one's friend.

exist is a standard that can be determined by those who speak for the community and there is an ethical obligation to contribute toward those needs.<sup>20</sup>

The right of eminent domain is limited. Maimonides distinguishes between the laws of a legitimate government and the laws of a “thieving government.”<sup>21</sup> This would imply that not all acts by a government are permitted, and that there is a limit to the power that it has to command private resources. The scope of the power granted to a community to compel financial contributions, such as taxes, for communal purposes, is described in Shulchan Aruch, Choshen Mishpat 163:1. The Shulchan Aruch allows a town to obligate its members to contribute financially to the erection of a wall and fortifications to protect the town against military assault or marauders. This obligation can be imposed regardless of whether or not there is an immediate threat to the town. The Rama writes that the town can also compel residents to contribute to a fund that provides for the town to finance ethical obligations, such as taking care of the poor and strangers.

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20 It could be argued that David was given additional leeway because of his special status as an anointed king. This position is unlikely because the context of the discussion is brought with regard to the general laws of personal property. Therefore, it is likely that the lessons that were meant to be applied were more universal. The commentaries mentioned above seem to glean universal lessons from this story. This would indicate that they also viewed the lessons as appropriate for the general population. The status of a king appears to be important in its relationship to the rest of society rather than a quasi mystical status of an anointed king. In other contexts, such as *Yeboshua*, *Rechavam*, and the *Reish Galusa*, the status of an anointed ruler is given special significance. This would presumably be because of the function they played in Jewish society as a head of state. It would seem that David would have enjoyed this status too, even while he was anointed. For a fascinating discussion on this topic see Lichtenstein, Moshe. “Jewish Political Theory- Hilchot Melakhim” available at <http://vbm-torah.org/kings.htm>.

21 Gezeilah Ve’avedah 5:18

Applying this ruling leads to the conclusion that once a person is part of a community, there is a broad scope of public services that a community can compel its citizens to pay for. However, it would seem that the communal funds must be gathered for the purpose of meeting a public need. It would be easy to imagine that public medical insurance could meet this definition. Medical care is a service that everybody needs at one point or another and if a town decides to create a communal insurance system to address the issue, the town would presumably have the right to set up such a system.

A system that is similar to Medicare should presumably meet this test because it provides a service that every person will come to benefit from. Medicare is a publicly funded healthcare system for all people who are over the age of 65. It provides added financial support for people who may find that they have increased medical needs while also having decreased incomes. Even if people do not anticipate using Medicare, they still have an obligation to contribute to public services. Medicaid is more problematic. Medicaid is a public fund to provide medical care for people with low income. This will not necessarily affect all members of the public.<sup>22</sup> In order for a government to have a mandate to provide public services, it must have a benefit for the public. However, as can be seen above, the Biblical *lo taaseh* clearly forbids any one individual from refusing to supply a person in need. Applying the opinion of the Rama, it would seem that the government's mandate to obligate its citizens to pay

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22 This is not necessarily true. Like all social security plans, it can be argued that Medicaid does provide a financial safety net that encourages investment and consumer spending. However, this is not an obvious benefit. As can be seen below, there are more concrete sources in Jewish law to rely upon.

for its poor is limited to its mandate to see that its citizens perform their ethical obligations. Therefore, government has the ability to create charitable social programs such as Medicaid for the purpose of meeting the community's charitable obligations. However, this is not a blanket mandate for unlimited social spending. The government could only compel charities that are obligatory within the scope of Jewish law.

### **V. Limitations on Societal Compulsion for Social Programs**

There are different limitations on the scope of the obligation for the *aseh* and *lo taaseh*. Rambam's interpretation of the laws derived from the *lo taaseh* emphasize that there should be a personal connection between the donor and the receiver. He notes that the Torah prohibition to not harden one's heart applies to "anyone who *sees* a peasant requesting money and raises his eyes and does not give him charity."<sup>23</sup> The prohibition circumscribes only refraining from giving in cases in which an individual is directly confronted by the peasant. It is important to keep in mind that the Torah describes the purpose for the *lo taaseh* as a way to avoid the undesirable trait of miserliness in a population. The goal is to have an impact on the donors. In this context it could be that the purpose of the *lo taaseh* is to create a charitable relationship that is intimate between donor and recipient.

The idea of an intimate charitable system necessitates that Jewish society be organized so that charity is flowing primarily from sources that are local and familiar with the

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23 Maimonides Matonos Le'Aniyim 7:2

needs of the poor. Maimonides infers from the Torah's qualification that the required amount be "what is lacking to *him*" as making all required donations determinable on a case-by-case basis. He writes "if he has no clothes, clothe him; if he has no house utensils then acquire some for him; if he has no wife, then marry him off; even if he is accustomed to ride on a horse with a servant in front of him, but he suffers financially, you should acquire the horse to ride on and a servant to run in front of him."<sup>24</sup> Such specific forms of donation require that the donor be familiar with the needs of the person being donated to.

Maimonides qualifies his statement by stating that this requirement only mandates a person to provide for what the person is lacking. He explicitly states that there is no obligation to enrich him. Striking the balance between supplying all of the person's needs without enriching him can only be accomplished with some familiarity of the person's needs. Maimonides also supports this contention by noting that the Torah enumerates the scope of the requirement to provide "what is lacking to *him*."<sup>25</sup> This suggests that the Torah assumes that a community is not required to provide broad coverage for a person who is needy because he is a peasant. Society is compelled to provide all necessary resources for a poor person who is in actual need of funds. However, it is not required to allow the poor person to profit by virtue of having been an indigent.

Failing to appreciate the specific needs of the poor is a failure of the social security system in general. For example, after the Bernie Madoff scandal became public

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<sup>24</sup> Matnos Aniyim 7:3.

<sup>25</sup> Ibid.

knowledge one wealthy investor committed suicide upon learning that he lost over a billion dollars. He was part of a wealthy and prestigious family, so there was no danger that he would be starving.<sup>26</sup> Yet this person undoubtedly needed some kind of social support, be it in the form of financial assistance or counseling, more than many people who are in considerably worse financial situations than he was. A social system that does not anticipate the needs of the public can also be susceptible to fraud. A clear example of what could constitute fraud occurred when a Long Island couple was recently charged with stealing more than \$33,000 from the Medicaid system. The district attorney reported that the couple had intentionally underreported their income in order to qualify for Medicaid benefits. While receiving these benefits, the couple had sold a home for \$1 million and bought another one for \$2 million.<sup>27</sup> Clearly, the system was not aware of the needs of this couple when it gave them the benefits. The aid it provided was enrichment and not charity. A system that dispersed funds in a more personal matter would have been more efficient.

It can be presumed that the limitations that are part of Jewish law are not meant to discourage any form of charitable giving. Maimonides stresses that the *lo taaseh* is merely creating a system of priorities for charitable giving so that greater priority is afforded when there is a familiarity between the donor and the poor person.<sup>28</sup> Maimonides

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26 <http://www.msnbc.msn.com/id/28368421>. April 4, 2010.

27 [http://www.nypost.com/p/news/local/prosecutor\\_wealthy\\_li\\_couple\\_stole\\_z4IoZIMhZa6MT5vYLT4SGI](http://www.nypost.com/p/news/local/prosecutor_wealthy_li_couple_stole_z4IoZIMhZa6MT5vYLT4SGI). April 4, 2010.

28 Matnos Aniyim 8:1.

interprets the Torah's specification that the peasant be from "your land" to mean that there is priority given to those with a closer relationship with the donor. He creates a hierarchy that begins with relatives and progresses to people with whom one shares living quarters, to poor people in one's neighborhood, and finally to poor people of other cities.<sup>29</sup> Apparently, Maimonides assumed that geographic proximity strengthened the relationship between people.

Interestingly, with regard to the *aseh*, Maimonides creates another set of priorities in the form of charitable programs that seem to deemphasize the connection between the donor and the poor person and his specific problems. The highest priority is to give in a way that leads the poor person to not regard the gift as charity. Some examples of this kind of giving are a gift, loan, business venture, etc. Following this form of charity the list continues in descending order: anonymous giving through a communal pot, donating anonymously so that the poor person is unaware who gave, giving in a manner that you are unaware of who benefits from the charity but the poor person is aware that you gave, giving before being asked, giving once asked, etc. These requirements suggest that the Torah envisages the better charitable system to involve less of a connection between the donor and the receiver.

The distinction can be explained in light of the goals of each charity. In the case of the *aseh*, the goal of the Torah is to give the person the opportunity to break from his status as a pauper. There is no pressing need for funds towards a specific goal. Under these circumstances, the specific needs of the peasant do not matter. Maimonides'

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29 Ibid.

system of priorities avoids enforcing a poor person's self-perception of poverty. The method for doing this is to avoid making the recipient of charitable donations feel like an outsider entitled to leech funds from a separate class but as a member of a community, equal in status with all of those who contribute to the community.

## **VI. Conclusion**

In summation, a society's ethical obligations to provide charity can be applied based on the ethical duties described in the two different Biblical descriptions of duties for charity, as well as the expanded treatment of them provided by the Talmud and Maimonides. Society can compel people to perform ethical obligations but is bound by the limits of that ethical obligation. The limits of the ethical obligation are only applicable when the community is requiring contributions to compel its citizens to give mandated charity and not a service that everyone benefits from. It appears that the community is obligated to provide charity in two different respects. There is an obligation to provide for the poor to the extent that they can recover from poverty and become part of the community. There is also an obligation to provide for the needs of others when they lack the means to supply them. This latter obligation requires that the donor be familiar with the needs of the individual in order to tailor the necessary donations for that individual in an appropriate manner. (This is especially true concerning healthcare, since providing too little or too much of a certain type of care can adversely affect a person's health.) In contrast, the former obligation should be fulfilled while avoiding the impression that a donation is

taking place. The recipient of the funds should not feel that they are receiving charity.

The distinction between local and distanced policies of charity has interesting applications in America with our system of state and local governments. It would appear that systems meant to address people with immediate needs could be relegated to the Federal government. This would allow the system to be considered an institutional public service. The recipient would experience less embarrassment and low self-esteem by applying to a large bureaucracy for help. Furthermore, the people with the most information about the economic state would be able to determine how much aid would be necessary to strengthen a poor person into becoming a viable part of the economy. Charity that is meant to address specific needs that people have would be best determined on the local level with input from people most familiar with the state of health of the local inhabitants. It would make sense for physicians and other health care professionals to be instrumental in determining what are the health needs of the local population. This would help focus available resources to meet those needs efficiently.