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### **Price Ceiling: The Charitable Status of Fee-Charging Nonprofits**

Is a fee-charging nonprofit legally “charitable” if it effectively excludes poor people from its services by charging high fees? This paper compares and contrasts how the English and U.S. legal systems answer this question.

The question itself draws attention to the difference between what “charity” and “charitable” mean for laypersons as opposed to lawyers versed in the “common law” i.e., the body of judge-made law that originated in England and was adopted by the U.S. and other former British colonies. In ordinary usage, charity means relief of the poor. Under the common law, however, “charity” can describe any nonprofit entity that (*inter alia*) advances education (e.g., schools), promotes health (e.g., hospitals) or relieves poverty. These purposes are free-standing: a school can be “charitable” without relieving poverty, and a poverty relief agency can be charitable without advancing education.

In Anglo-American common law, the fact that a nonprofit hospital, school, etc., charges fees for its services does not automatically make it non-charitable. Yet what is the upper limit of this principle? In the U.S., nonprofit hospitals must provide charity care to the uninsured and underinsured or risk losing their tax-exempt status. In England, expensive nonprofit private schools can be legally “charitable” even if they offer no financial aid, so long as they at least consider the needs of the poor.

Why do the English and U.S. legal systems disagree on the charitability of fee-charging nonprofits? The answer, this paper argues, lies in whether a legal system’s definition of “charitable” is singular or multiple. English law uses the same definition of “charitable” for both common law and tax-exempt purposes, while U.S. law does not. As a result, the U.S. legal system has more flexibility to gradate the fiscal and other advantages it confers upon nonprofits to better reflect the amount of public benefit they provide. For example, it can deem a nonprofit hospital a “charity” for common law purposes (e.g., if “charitable,” a trust can endure indefinitely; private trusts by contrast must expire within a generation or two), while at the same time rejecting the hospital’s charitableness not for tax-exempt purposes.

This analysis lays the foundation for drawing normative conclusions, such as “which is better, and why.”