Hastings Business Law Journal

Volume 9
Number 3 *Spring 2013*

Article 3

Spring 1-1-2013

Burning Man: A Case Study of Altruism Thriving in a For-profit Organizational Form and the Rationales for LLC-to-Nonprofit Conversion

Yuan Ji

Burning Man: A Case Study of Altruism Thriving in a For-profit Organizational Form and the Rationales for LLC-to-Nonprofit Conversion

*Yuan Ji**

Burning Man is a temporary city of over 50,000 citizens that exists for one week every year in Nevada's Black Rock Desert. Burning Man is perhaps best known in popular culture for its celebration of interactive art, experimental community building, gift economy, and ritual burning of a large wooden structure in the shape of a man. The case study of Burning Man is used to illustrate that an altruistic organization, one that is ideologically committed to the provision of public goods and not driven by profit, can nevertheless thrive in a for-profit legal form while staying true to its mission. Depending on organization-specific conditions, the nonprofit form can be, but does not necessarily have to be, the best structure for the provision of altruism and public goods (or quasi-public goods). As an organization evolves and becomes more complex overtime, however, the organization form that best serves its mission can change as well. Still, the nonprofit form alone neither guarantees altruistic commitment nor is immune from abusive practices within the management or board of directors. This article discusses the theories on nonprofit formation that make persuasive rationales for Burning Man's conversion to a nonprofit structure; it also makes specific recommendations for better organizational accountability and transparency in the Project's current and future operations.

* Associate, Wilson Sonsini Goodrich & Rosati; J.D., Yale Law School; M.S. & B.A., Washington University in St. Louis. The author is grateful to Professors Robert Ellickson, Henry Hansmann, and Susan Rose-Ackerman for their guidance; Marian Goodell for her time; and the editors of the *Hastings Business Law Journal* for their assistance. All opinions and impressions stated are the author's alone; they have not been reviewed by the Burning Man organization or by its legal and tax advisers.

I. INTRODUCTION

Vigorous debate on what is the right choice of organizational form for business enterprises has arisen in a wide array of sectors, ranging from the contemporary women's movement to the day care industry.[1] An important subset of this debate focuses on the choice between for-profit and nonprofit forms for organizations with altruistic missions, asks what is the most appropriate form for the provision of public goods, and offers theories on whether public subsidies like tax exemption or grant funding should be conditional on the recipient's nonprofit status.[2] This article contributes to this debate the unusual and fascinating case study of Burning Man, a temporary city that flourishes in the desolation of the Nevada desert for one week every year and disappears with no trace at the end of that week, at least until its rebirth the next year. Burning Man's story is the story of an altruistic organization that, despite its indifference to profit making, made the unintuitive but right choice to operate as a for-profit Limited Liability Company ("LLC") in the beginning. As Burning Man evolved and matured overtime, however, so has the organizational form that would best advance its values and goals.

This article is my humble gift to the citizens of Burning Man and

1. *See*, *e.g.*, REBECCA L. BORDT, THE STRUCTURE OF WOMEN'S NONPROFIT ORGANIZATIONS 9–11 (1997); Elizabeth Mauser, *The Importance of Organizational Form: Parental Perception versus Reality in the Day Care Industry*, *in* PRIVATE ACTION AND THE PUBLIC GOOD 124 (Walter W. Powell & Elisabeth S. Clemens eds., 1998).

2. *See, e.g.*, Evelyn Brody, *Agents Without Principals: The Economic Convergence of the Nonprofit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 535–56 (1996) (arguing that nonprofits and for-profits are subject to overlapping economic conditions and therefore more similar than conventionally believed, and suggesting that similar organizations should receive similar tax treatments regardless of differences in their organizational forms); Henry B. Hansmann, *Economic Theories of Nonprofit Organization*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 27, 28–33 (Walter W. Powell ed., 1987) (summarizing the at times competing and at times complementary economic theories on nonprofit formation by various scholars) [hereinafter Hansmann I]; Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 55 (1981) (arguing that the tax exemption of nonprofits is justified because of the extra difficulty nonprofits face in raising capital, and that such tax exemption is a useful public subsidy in industries that are better served by nonprofits than by for-profit firms) [hereinafter Hansmann II]; Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2023 (2007) (proposing that for-profits engaged in charitable activities should receive identical tax treatments as their nonprofit counterparts, because tax subsidies for charitable activities should not be conditional on organizational form); Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. ECON. LIT. 701, 723–24 (1996) (concluding that the nonprofit form instills more trust in consumers with imperfect information about service quality, provides an outlet for individuals' generosities, and is favored by ideological entrepreneurs who do not care about profit maximization).

to Black Rock City LLC,[3] the organization that makes Burning Man possible. It makes a two-fold contribution to the for-profit versus nonprofit debate on organizational forms. First, an altruistic organization, one that is ideologically committed to the provision of public goods and not driven by profit, can nevertheless thrive in a for-profit legal form and stay true to its mission. Depending on organization-specific conditions, the nonprofit form is not necessarily, at least in the company's early days, the only or the best structure for the provision of altruism and public goods (or quasi-public goods).

However, as an organization evolves and its needs take on more complexity, the legal form that would best further its altruistic mission can change as well. The second proposal made in this article is that even if a for-profit form was once an equally good or better alternative for an altruistic organization, the nonprofit form can become the best fit once the organization reaches advanced stages of institutional evolution and learning. This recommended transition to a nonprofit structure should be qualified with the following advice: A for-profit altruistic organization should not blindly convert to a nonprofit structure without weighing benefits like favorable tax treatments and grant funding against costs such as the loss of organizational flexibility and the danger of commercialization.

What relevance can one offbeat organization's story add to the existing scholarship on organizational forms and nonprofit formation theories? A case in point is American Online's ("AOL") recent $315 million acquisition of the Huffington Post from Arianna Huffington in February 2011. The sale has been vehemently criticized as an exploitation of writers' and bloggers' free labor for Arianna Huffington's personal gain.[4] Those who contributed their time and labor without pay did so because they wanted to contribute to a liberal media alternative that is free from corporate ownership and committed to the dissemination of knowledge and opinions; the fact that the Huffington Post has been sold for some individual's private gain is an unexpectedly disappointing betrayal.[5] The Huffington Post controversy illustrates that even for readers who have never heard of (let alone care about) Burning Man, this case study should nonetheless offer food for thought to citizens who care about the

3. To be consistent with the lingo within the organization, I will interchangeably refer to Black Rock City as the Burning Man organization or the Project.

4. *See*, *e.g.*, David Carr, *At Media Companies, A Nation of Serfs*, N.Y. TIMES (Feb. 13, 2011), http://www.nytimes.com/2011/02/14/business/media/14carr.html; Bill Lasarow, *Why Our Writers Are on Strike Against the Huffington Post*, THE GUARDIAN (Mar. 5, 2011), http://www.guardian.co.uk/commentisfree/cifamerica/2011/mar/05/huffington-post-aol.

5. *See* Paul Harris, *Arianna Huffington's AOL Deal Sparks Accusations of a Political Sell-out*, THE GUARDIAN (Feb. 27, 2011), http://www.guardian.co.uk/media/2011/feb/27/arianna-huffington-post-aol-deal.

provision and funding of public goods, and to ideological organizations that either currently operate in or are contemplating a nonprofit structure.

A business's choice of organizational form is important because of its impact on institutional behavior and consistency with the organization's mission. For participants and volunteers who are drawn to and become emotionally invested in an organization because of its ideological commitments, as is the case for Burning Man, this choice is all the more important because these individual attachments hinge substantially on the following conviction: The Burning Man experience is provided through an organizational form that is appropriate for the Project's altruistic mission.

Although the Burning Man experience has no real substitutes, it does have themes in common with some preexisting cultural phenomena. Variations of potlatch, the deliberate distribution and destruction of accumulated wealth as a form of gift giving, have been practiced by cultures like certain indigenous communities in North America's Pacific Northwest Coast.[6] Extravagant to the point of financially ruinous at times, gifts of material goods are ostentatiously given away or destroyed at these ceremonial gatherings to mark milestone events in the community like marriages and deaths, or to compete with rival clans in a showdown for prestige and social status. The impersonal, transaction-based nature of capitalism has inspired in intellectuals and popular culture alike the yearning for a purer, more genuine form of personal relations, the community-sustaining kind found in primitive nonmarket societies.[7] Burning Man encapsulates all of the above values and much more.

6. *See* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 31–41 (1954); *see also* Bruce Johnsen, *The Formation and Protection of Property Rights Among the Southern Kwakiutl Indians*, 15 J. LEGAL STUD. 41, 41 (1986) (adopting a rational-actor view of potlatching as a well-developed system of exclusive property rights among the Southern Kwakiutl Indians). Various ethnographies written by Franz Boas, the anthropologist who in the late 1800s produced the first documentations of potlatch, are also good background readings on the subject. *See, e.g.*, Franz Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians*, *in* SOURCE BOOK IN ANTHROPOLOGY 389 (A. L. Kroeber & T. T. Waterman eds., 1920).

7. *See* Robert V. Kozinets, *Can Consumers Escape the Market? Emancipatory Illuminations from Burning Man*, 29 J. CONSUMER RESEARCH 20, 29 (2002); AVATAR (20th Century Fox 2009) (portraying the mining company RDA as a corporate machine that values profit over life with no regard for its actions' destructive consequences for the Na'vi community).

(Aerial photo of the 2009 Burning Man. Photo Credit: Scott London)

Aerial photos of Burning Man[8] reveal a fingerprint etched in the desolation of northwestern Nevada's Black Rock Desert. A less than fully formed sundial, partitioned by radial spokes branching symmetrically away from the circular epicenter in which the Man stands: This is an image that many Burners know by heart, a visual echo of the "Welcome home" that they are greeted with every year upon entering the gates. For one week every August, Burning Man reawakens. During this week, a mirage of art festival and intentional community fueled by astounding and spontaneous creativity is reality on Black Rock Playa, a dry and ancient lakebed of chalky white dust and flat nothingness located on federal land.

As the largest Special Recreation Permit use in the country granted by the U.S. Department of Interior's Bureau of Land Management, Burning Man is a real metropolis with its own roads, street signs, municipal airport, newspaper, radio station, café, recycling center, public service volunteers, and law enforcement.[9] On the Saturday before Labor Day every year, a forty feet wood-and-neon Man standing atop a base of roughly equal height is set on fire,

8. AERIAL PHOTO OF BURNING MAN, *available at* www.deepbottle.com/img/Fun/the-dust-storm-burning-man-2010/the-dust-storm-burning-man-2010-04.jpg (last visited Nov. 10, 2012).

9. Burning Man is, as of 2006 and most likely will continue to be, the beneficiary of the largest Special Recreation Permit in the country. *Burning Man Timeline*, BURNING MAN, http://www.burningman.com/whatisburningman/about_burningman/bm_timeline.html (last visited Nov. 10, 2012). For a sampling of civilian life and civil institutions within Black Rock City, see Lee Gilmore & Mark Van Proyen, *Introduction, in* AFTERBURN: REFLECTIONS ON BURNING MAN 1, 3–4 (Lee Gimore & Mark Van Proyen, eds., 2005); *see also The Playa: Black Rock City Really Is A City*, BURNING MAN, http://www.burningman.com/on_the_playa/ (last visited Nov. 10, 2012).

illuminating the event's watershed moment against a backdrop of desert night sky. Some elaborate art installations—products of massive expenditures in labor, time, and money—are also burned (most of the time intentionally, but not always).[10] The burning of art is not merely tolerated at Burning Man; it is a time-honored tradition with the sanction of fire marshals.[11]

Though ultimately no amount of words can adequately encapsulate the Burning Man experience, Part II introduces the Project through a brief outline of its history and values. It also discusses the reasons behind Burning Man's adoption of the current LLC form and the tentative plan for its transition to a nonprofit structure. Part III stresses the importance of organizational form for business enterprises by first offering a literature review on the ways in which organizational form affects institutional behavior. Next, it highlights three alternative organizational forms for Burning Man: the nonprofit, the LLC, and hybrid for-profit/nonprofit forms. An examination of various theories on nonprofit formation reveals that the best rationales for Burning Man's conversion to nonprofit status are its need to credibly signal altruism and access to public subsidies. Part IV defends the Project's ability to uphold its altruistic mission as a for-profit LLC, reflects on the nonprofit form's advantages and caveats, and makes recommendations for Burning Man's future operation.

II. MEET BURNING MAN

It is remarkable to think about Burning Man's evolution over the past twenty-five years: What started in 1986 as an informal gathering of two friends who decided to burn a wooden man on San Francisco's Baker Beach, and the crowd of strangers spontaneously drawn to the flames, has developed into a fully functional temporary city of over 50,000 denizens.[12] The ritual of burning the Man belies the real essence of this community. Burning Man is not strictly an art festival, gift economy, intentional community, pilgrimage, or experimental temporary city: It is all of these things in one.

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10. *See* BRIAN DOHERTY, THIS IS BURNING MAN: THE RISE OF A NEW AMERICAN UNDERGROUND 150 (2006).

11. Art burns at Burning Man are not free-for-all affairs and have been subject to restrictions due to environmental damage concerns since around 1999. DOHERTY, *supra* note 10, at 187 (2006); *see Open Fire Guidelines*, BURNING MAN, www.burningman.com/installations/open_ fire.html (last visited Nov. 10, 2012).

12. The 2010 census for Burning Man is 51,454. Black Rock City, TWITTER, http://twitter.com/blackrockcity/status/27265721545 (last visited Nov. 10, 212).

Creativity, collaboration, participation, and gift giving are fundamental to Burning Man. They are themes that run through Burning Man's Ten Principles including decommodification,[13] radical self-reliance, radical self-expression, and participation.[14] Commercial sponsorships, advertisements, and transactions are banned at the event to preserve the spirit of gift giving and to promote participatory experience over passive consumption.[15] Each individual is invited to be a participant rather than a spectator, and self-expression is viewed as a gift to others in the community. The ways in which an individual can participate in Burning Man are limitless; one can, for example, make art, interact with others' art, organize a theme camp, or volunteer for one of the numerous civic organizations within Black Rock City. Ultimately, it is up to the individual to decide how to contribute and express oneself.

It would be a challenge to categorize the type of people who participate in Burning Man, as Burners come in all kinds. They include, to name a few, fire spinners and welders, academics and artists, fishermen, and the founders of Google.[16] Most are American, Caucasian, between the age of twenty-five and fifty, and hold college or advanced degrees.[17] The male to female ratio is roughly one to one, and a significant contingency work in informational technology sectors in the San Francisco Bay Area.[18]

Art is ubiquitous at Burning Man. Larry Harvey, the director of the Project's Senior Staff and a mastermind figure who came up with the idea to burn the first Man on Baker Beach back in 1986, picks a theme every year as a way to unify the artworks and citizens' contributions in Black Rock city.[19] The theme can manifest itself in interactive theme camps, large-scale art installations, gifts, costumes, or any medium of one's choice. In 2001, a nonprofit 501(c)(3) branch

13. With the exceptions of ice, coffee, and tickets at the gate, there is nothing for sale at Burning Man. DOHERTY, *supra* note 10, at 5.

14. *Ten Principles of Burning Man*, BURNING MAN, http://www.burningman.com/whatisburningman/about_burningman/principles.html (last visited Nov. 10, 2012).

15. *Id.*

16. *See* DOHERTY, *supra* note 10, at 11; Fred Turner, Burning Man at Google: A Cultural Infrastructure for New Media Production, 11 NEW MEDIA SOCIETY 73, 75 (2009).

17. *See* Kozinets, *supra* note 7, at 23; DOHERTY, *supra* note 10, at 10; *AfterBurn Report 2008*, BURNING MAN, http://afterburn.burningman.com/08/census/index.html (last visited Nov. 10, 2012) (reporting that of the 2008 Burning Man participants surveyed, 73 percent considered themselves to be white, 85 percent reported that they were eligible to vote in the United States, and 68 percent held bachelor's or higher degrees).

18. *AfterBurn Report 2008*, *supra* note 17; *accord* Turner, *supra* note 16, at 74–75.

19. *What Is Burning Man*, BURNING MAN, http://www.burningman.com/whatisburningman (last visited Nov. 10, 2012). The 1998 Burn was the first to have a unifying art theme. For a list of themes and photos of corresponding artworks from previous years, access the Art Installation Archive at the bottom-right corner of http://www.burningman.com/art_of_burningman.

of Black Rock City LLC, the Black Rock Arts Foundation ("BRAF"), was created to award honoraria funding for artists' proposed art installations.[20]

Despite commonalities it shares with other festivals, gatherings, and intentional communities, the Burning Man experience is in a league of its own and has no real competitors. The annual Rainbow Family gatherings that take place in national forests on federal land can be summarized as large but informally organized hippie shindigs.[21] Bohemian Grove, the two-week retreat that the private Bohemian Club organizes in California's redwood forest every summer, has similar aspects like theme camps, effigy burning, and elaborate art productions. The Bohemian Club, however, with its shroud of secrecy and male-only membership of prominent figures in the country's political, corporate, financial, and artistic sectors, is very much about exclusion and runs against Burning Man's principle of radical inclusion. Burning Man does *not* turn away anyone who wishes to participate in the community.[22]

The ways in which Burning Man is unique will become more significant in the later discussion of theories on nonprofit formation and their applicability to Burning Man in Part III.B. First, art appreciation at Burning Man takes a no-holds-barred approach of participatory creation and interactive enjoyment; it does away with the norms of how one should experience art in a traditional museum, and with the strict division between active production and passive audience. Second, unlike packaged travel destinations and commercial festivals, it seeks spontaneity and participation from every Burner, not spectatorship.[23] Third, Burning Man is unique not only because there is an organization devoted year-round to all aspects of its production from planning to clean up, but also because of the organization's heavy reliance on volunteer labor to supplement a small core staff.

Black Rock City, in spite of its for-profit LLC form, is not a typical company driven by profit and bureaucratic practices. The Project is committed to decisionmaking by consensus at every level within the organization.[24] Consistent with the principle of radical inclusion, the management of volunteer labor at Burning Man places

20. *Case Statement*, BLACK ROCK ARTS FOUNDATION, http://blackrockarts.org/test-and-demo-eli-josie-etc/case-statement (last visited Nov. 10, 2012); Katherine K. Chen & Siobhan O'Mahony, *Differentiating Organizational Boundaries*, in 26 Res. Soc. Org. 183, 203 (2009).

21. DOHERTY, *supra* note 10, at 3–4; DAVID B. SENTELLE, JUDGE DAVE AND THE RAINBOW PEOPLE 4–5 (2002).

22. *Ten Principles of Burning Man*, *supra* note 14.

23. Chen & O'Mahony, *supra* note 20, at 195–96.

24. *AfterBurn Report 2010: Consensus, Hierarchy, Authority and Power*, BURNING MAN, http://afterburn.burningman.com/10/org/consensus.html (last visited Nov. 10, 2012).

an emphasis on collectivism over efficiency and tries to find the best fit for everyone who is interested in participating based on his/her interests, even if this entails experimentation or the creation of new positions.[25]

To be clear, consensus decisionmaking is not the same thing as democracy. Rather, Burning Man can be more aptly described as a "do-ocracy": Members contribute to the organization by coming and doing. Perhaps it would be more appropriate to describe the decisionmaking process within Burning Man's organization as consensus building by default that resorts to top-down hierarchy when specific issues call for the kind of organizational expertise or institutional memory that the average participant simply does not have.[26] Consensus does not mean that participants should have a say in every single decision; while the organizers will listen to all interested members' ideas and incorporate them into decisionmaking processes as appropriate, the organizers have the final say in certain issues like financial allocation.[27]

In the annual AfterBurn Report that the organizers have published online for every Burning Man event since 2001, the consensus document clarifies that decisionmaking is about creating agreement among all participants, not about obtaining a majority vote. For a decision to be adopted, every participant must give his or her consent, but not everyone has to agree that it is the best decision. Decisionmaking at Black Rock City does not use voting; votes, which can be traded, bid on, or leveraged for power, are viewed as the commoditization of opinions.[28]

A. REASONS FOR ADOPTING THE CURRENT LLC STRUCTURE

Black Rock City is a LLC registered in the state of Nevada and comprised of six members holding equal interests.[29] These six individuals serve on the Burning Man Board, the most senior management entity in the organization.[30] Larry Harvey, the Project's conceptual engineer, takes the helm as the chairman of the LLC and

25. KATHERINE K. CHEN, ENABLING CREATIVE CHAOS: THE ORGANIZATION BEHIND THE BURNING MAN EVENT 70–79 (2009).

26. *See id.* at 61.

27. *Id.* at 54–55, 61.

28. *AfterBurn Report 2010: Consensus, Hierarchy, Authority and Power*, *supra* note 24.

29. *AfterBurn Report 2010: Black Rock City LLC Operating Agreement*, BURNING MAN, http://afterburn.burningman.com/10/org/llc_agreement.html (last visited Nov. 10, 2012); *see* Articles of Organization, Black Rock City LLC (on file with author).

30. *Burning Man Board*, BURNING MAN, http://www.burningman.com/whatisburningman/organization/board.html (last visited Nov. 10, 2012).

Burning Man's Senior Staff. The other five members of the LLC are Marian Goodell, Michael Michael (also known as Danger Ranger), Crimson Rose, Will Roger, and Harley Dubois, all of whom have been integrally involved in Burning Man's management and operation since the Project's early days.[31]

For a brief period of time, Black Rock City existed as a three-person legal partnership, a form which subjects the personal assets of partners to liabilities arising from the event. The 1996 event marked a turning point: reckless behavior on the part of some individuals, two tragic accidents, unanticipated population growth, and insufficient resources made it clear that more formal organization was necessary if Burning Man were to continue.[32] Ensuing internal disagreements as to the future of Burning Man and the departure of one partner led to the dissolution of the partnership and the adoption of the current LLC form in 1997.[33]

The organizers in 1997 decided to operate as a LLC for several reasons. Profit making was not one of them. Doing business with agencies and resource providers like the Bureau of Land Management and equipment rental companies required the legitimacy of some kind of legal entity.[34] The Bureau of Land Management and the resource providers did not have preferences for the specific organizational form that Burning Man adopts, so long as it had one.[35] The LLC form was flexible and easy to implement compared to alternatives like the nonprofit form which imposes more onerous requirements.[36] For one thing, the nonprofit form would have necessitated the creation of a disinterested board of directors to exercise oversight over the management.

As the six LLC owners are key organizers with a deep personal investment in both running and experiencing Burning Man, it did not seem right for them to become the hired managers of a nonprofit entity and cede authority to a disinterested board that makes decisions without doing the actual work.[37] Unlike the prior legal partnership status that Black Rock City took on briefly, the LLC

31. DOHERTY, *supra* note 10, at 123; *see Burning Man Board*, *supra* note 30.

32. *See* CHEN, *supra* note 25, at 30–31, 45.

33. *Id.* at 31, 46.

34. *Id.* at 46; Telephone Interview with Marian Goodell, Dir. of Bus. & Commc'ns, Black Rock City LLC (Mar. 29, 2011).

35. Telephone Interview with Marian Goodell, *supra* note 34.

36. *Id.* *See generally* Nev. Rev. Stat. §§ 82.006–82.546 (1999), *available at* http://www.leg.state.nv.us/NRS/nrs-082.html; CATHERINE CORTEZ MASTO, NEVADA DEP'T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, A GUIDE TO NON-PROFITS, *available at* http://ag.state.nv.us/publications/manuals/Guide%20to%20NonProfits.pdf.

37. DOHERTY, *supra* note 10, at 122–23; *AfterBurn Report 2010: Financial Structure*, BURNING MAN, http://afterburn.burningman.com/10/org/financial_structure.html (last visited Nov. 10, 2012).

form also protects the owners' personal assets from liability arising from the event. Protection against liability, however, was more of a fringe benefit for adopting the LLC form; after all, the organizers did not have much in the way of personal assets back in 1997.[38]

Jokingly referred to as a "no-profit" by Larry Harvey, Black Rock City is not a traditional LLC. In line with its opposition to commercialism, the organization does not accept investors or commercial sponsors. The actual event operates under a gift economy and forbids all forms of vending except for ice and coffee sales.[39] Though the event is not free and is funded primarily by ticket sales both at the gate and leading up to the event, the organization behind Burning Man is an ideological one, committed to values and goals that are not driven by, and sometimes completely at odds with, profit making. This is a group of people who do not seem to care much about profit or efficiency, but feel compelled to run Burning Man as a business in order to ensure the Project's continuation. It does not take an efficient bottom-line approach and embraces collectivist practices like consensus decisionmaking; its volunteer placement process is more keen on tailoring to the individual's interests rather than ensuring the efficient allocation of resources.[40]

Members of the Burning Man community care about Black Rock City's organizational form because their experiences are affected by the Project's behind-the-scenes consistency with its purported principles. Choosing the right organizational form is an important task for any institution. For an organization such as Burning Man that is ideologically committed to inclusion, consensus decisionmaking, and active participation from all community members, its choice of organization form takes on imperative significance. In a recent phone conversation, Marian Goodell recollected how when people found out that Burning Man was being run by a LLC, they were often surprised or disappointed.[41] What lies at the core of these reactions seems to be a visceral distrust of a

38. Telephone Interview with Marian Goodell, *supra* note 34.

39. *AfterBurn Report 2010: Financial Structure*, *supra* note 37. Coffee sales break even, and profits from ice sales are donated to local charity and community groups. Telephone Interview with Marian Goodell, *supra* note 34. For a list of charitable donation recipients of ice sale profits from 2010, see Andie Grace, *Burning Man's Charitable Donations for 2010*, THE BURNING BLOG (Dec. 20, 2010), http://blog.burningman.com/news/burning-mans-charitable-donations-for-2010.

40. CHEN, *supra* note 25, at 52–53. Black Rock City LLC takes a collectivist approach in its volunteer management practices where inclusion trumps efficiency. New projects and responsibilities proposed by individuals are given a chance to prove themselves even if they are not viewed as efficient allocations of resources. Volunteer coordinators also accept and train more volunteers than necessary for a given job because they expect there to be no-shows when the time comes to get the job done. *Id.* at 75–77.

41. Telephone Interview with Marian Goodell, *supra* note 34.

LLC's ability to stay true to Burning Man's altruistic vision of community, and the belief that the nonprofit form is the best structure for the provision of public goods. Because a significant part of Burning Man's appeal is that its gift economy creates among strangers an environment that we normally reserve for intimates, and because participants who are not satisfied with how the Project is run can exit with ease, picking the organizational form that credibly signals its commitment to altruism is vital to Burning Man's long-term survival.[42]

The organizers' decision to adopt the for-profit LLC form is not an intuitive one given Burning Man's reliance on volunteer labor, antimarket spirit, and deliberate destruction of accumulated wealth. The Project's for-profit form has been attacked as a medium for profit maximization through the exploitation of volunteer labor. Dedicated members have raised concerns that formal organization gives rise to hierarchical decisionmaking, micromanagement, and lack of empowerment to senior volunteers, all of which prioritize bureaucracy over participant input and dehumanize the whole process.[43]

Indeed, organizers had considered forming as a nonprofit in the past, and critics within the organization have called for restructuring as a nonprofit because it would provide more organizational credibility and accountability to the community than a for-profit form would.[44] Many people recognized that due to its sheer size, Burning Man requires some kind of formal organization and the financial means of maintaining a year-round staff, but with a large volunteer labor force and ticket prices growing every year, even those who do not demand the Project's conversion to nonprofit status have questioned the organization's lack of financial transparency.[45] Organizers have been receptive to these concerns by improving organizational accountability in several ways. Selective disclosures of financial expenses like Larry Harvey's salary have been published in newsletters starting in 1993.[46] Black Rock Arts Foundation ("BRAF"), the LLC's nonprofit branch dedicated to the gathering and distribution of grants to fund art projects, was added in 2001. Starting with the 2001 Burn and for every year since, the annual

42. *See infra* Part III.B.3.
43. *See* CHEN, *supra* note 25, at 48.
44. *See* CHEN, *supra* note 25, at 48–49; *AfterBurn Report 2010: Financial Structure*, *supra* note 37.
45. CHEN, *supra* note 25, at 49–50.
46. *Id.* at 52–53.

companion AfterBurn Report available online has included a financial report of itemized expenses for running the event.[47]

To protect the Project's property from commercialization, Black Rock City LLC's operating agreement has incorporated a non-transferability provision: No member of the LLC can transfer his or her interest in the organization's property in the event of death or departure from the partnership. The organizers feel strongly that no member's share of the organization should be alienable and open to the possibility of sale or transfer like a commodity in the market place.[48] Nevada law, however, treats each member's interest in a LLC as transferrable personal property, which can be sold to or traded with any recipient.[49] Upon resignation or withdrawal, a member is entitled to the fair market value of his or her share unless the LLC's articles of organization or operating agreement specifies otherwise.[50] The organizers added the non-transferability provision to the operating agreement to address their unease with this characteristic of the LLC form. Members of the LLC who leave the Project "will receive, as sole compensation for many years of service, a golden parachute of $20,000. Their share will then revert back to the group."[51] Assets belonging to the Burning Man organization are not for sale—they will always belong to the community rather than to any single individual.

B. CONVERSION TO A NONPROFIT ENTITY

The timing of this Article is rather uncanny. After I decided to pursue the topic of organizational form choice, I learned that Burning Man is in the process of converting from the current LLC to a nonprofit structure.[52] The full transition is estimated to take place in the next three to five years.[53] As of the date of publication, exactly when and how this transition will take place is still under discussion and has not yet been determined.[54]

47. *See, e.g.*, *AfterBurn Report 2009: Financial Chart*, BURNING MAN, http://afterburn.burningman.com/09/financial_chart.html (last visited Nov. 10, 2012).

48. *AfterBurn Report 2010: Financial Structure*, *supra* note 37.

49. *See* NEV. REV. STAT. § 86.351(1) (1999), *available at* www.leg.state.nv.us/nrs/ NRS-086.html#NRS086Sec091.

50. *Id.*

51. *AfterBurn Report 2010: Financial Structure*, *supra* note 37.

52. *See* John Curley, *The State of the Man*, THE BURNING BLOG (Sept. 1, 2010), http://blog.burningman.com/eventshappenings/the-state-of-the-man.

53. Telephone Interview with Marian Goodell, *supra* note 34.

54. E-mail from Brooke Oliver, Legal Counsel, Black Rock City LLC, to Yuan Ji (Nov. 20, 2012, 16:43 EDT) (on file with author).

III. ALTERNATIVE ORGANIZATIONAL FORMS

The Burning Man community's opinions on what is the best organizational form for the Project are undoubtedly important, and the organizers' receptiveness to the participants' feedback in the decision to convert to a nonprofit is commendable. However, it is not obvious that the nonprofit is an inherently better form for the provision of public goods, assuming that Burning Man provides a public good.

This Part will first offer a literature review on the various ways in which a business's choice of organizational form can affect institutional behavior. It will then analyze three organizational structure alternatives for the facilitation of altruism: The nonprofit, the LLC, and the hybrid. Part III.B applies to Burning Man four theories on nonprofit formation to show that the need for credible signaling of altruism and access to public subsidies are the best rationales for the Project's transition to a nonprofit structure. These rationales, however, do not negate the fact that altruistic organizations can succeed in a for-profit form. Part III.C outlines the LLC form's history to highlight its flexibility and advantages for closely held corporations. Part III.D points to the recent rise of hybrid for-profit/nonprofit forms like the L3C and the B Corporation in various states, which are still in their infancy for adequate evaluation but may prove to be good options for the Burning Man organization in the future.

A. HOW THE CHOICE OF ORGANIZATIONAL FORM AFFECTS INSTITUTIONAL BEHAVIOR

The best organizational form for an organization will vary depending on the interaction between a particular form's influence on institutional behavior and its mission, which can be but is not necessarily the maximization of profits. This Part, through a review of literature, illustrates the three ways in which organizational form can influence institutional behavior: incentives for administrators and employees, consumers' patronage based on their perceptions of the organization, and differences in regulatory treatment.[55] Criteria for evaluating an organizational form's effectiveness are also suggested

55. *See* Mark Schlesinger, *Mismeasuring the Consequences of Ownership: External Influences and the Comparative Performance of Public, For-Profit, and Private Nonprofit Organizations*, *in* PRIVATE ACTION AND THE PUBLIC GOOD 85, 87–88 (Walter W. Powell & Elisabeth S. Clemens eds., 1998).

for the discussion of alternative forms in Part III.

Incentives to administrators and employees affect an institution's productivity and competitive advantage against competitors, which determine its long-term survival. As bound by the laws of the state in which it is formed, every nonprofit is subject to the nondistribution constraint that prohibits the distribution of profits to its officers, directors, members, or trustees.[56] Because of restrictions on financial compensation like the lack of stock options, nonprofits tend to shift toward nonfinancial "perks" to reward their employees. Changing patterns of compensation to employees can contribute to differences in organization performance.[57]

Consumers base their perceptions of an organization's trustworthiness on its choice of organizational form when there is informational asymmetry between the consumers and the organization. Informational asymmetry arises when the services provided by an organization are sufficiently complex that the consumers cannot directly monitor the delivery or assess the quality of the products they have purchased.[58] Examples of such services include donation-financed charities, day care providers, and financial intermediaries. For consumers who worry that the providers may exploit informational asymmetry by offering products of inferior quality or quantity and pocketing the savings for private gains, the nonprofit form can serve as a signal of trustworthiness for two reasons. First, the nonprofit form's nondistribution constraint serves as a check against abuse by managers seeking personal gains.[59] Second, nonprofits that pursue organizational goals other than profit maximization appear more trustworthy if they espouse nonfinancial values that are at odds with consumer exploitation.[60] Part III.B.3 will discuss why the signaling of trustworthiness, while undoubtedly important for any business, is crucial to Burning Man's continued existence.

56. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, *in* THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 57, 58 (Susan Rose-Ackerman ed., 1986) [hereinafter Hansmann III].

57. Schlesinger, *supra* note 55, at 87; *see* Laura Leete, *Work in the Nonprofit Sector*, *in* The Nonprofit Sector: A Research Handbook 159, 163 (Walter W. Powell ed., 2006) (noting that in the 1990s, the rapid rise and the shift toward performance-based packages in for-profit executive compensation are factors driving the public discourse on how compensation practices in the nonprofit sector should diverge from their for-profit counterparts).

58. *See* Burton A. Weisbrod, *Institutional Form and Organizational Behavior*, *in* PRIVATE ACTION AND THE PUBLIC GOOD 69, 74 (Walter W. Powell & Elisabeth S. Clemens eds. 1998) [hereinafter Weisbrod I].

59. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 862–83 (1980) [hereinafter Hansmann IV].

60. Schlesinger, *supra* note 55, at 87.

The third way in which organizational form can influence institutional behavior is differential treatment by regulators. Most nonprofits, for example, are exempt from property, sales, and corporate income taxation. For industries in which nonprofits compete against for-profit firms, this preferential tax treatment has been shown to increase the market share of nonprofits relative to their for-profit competitors.[61] Other preferential treatments available to most nonprofits include reduced postal rates, the ability to issue tax-exempt bonds and, for nonprofits that have acquired 501(c)(3) exempt status, different criteria and payment options for satisfying their liabilities under unemployment insurance laws.[62]

Criteria used to evaluate institutional behavior include, but are not limited to, efficiency, output quality, consumer informational deficiencies, and output rationing methods.[63] In measuring efficiency and output quality, it cannot be assumed that identical outputs can be produced regardless of organizational form. For example, the nonprofit form can more credibly produce outputs that stay true to the organization's social values and are not driven by profit; products with these traits are different from, but hard to measure in tangible ways relative to, their for-profit counterparts, which might in turn bias valuations of the nonprofit form's comparative efficiency.[64] On the input end, Henry Hansmann has argued that, at least in industries in which nonprofits are likely to serve consumers better than for-profit firms would, the corporate income tax exemption for nonprofits is justified because it compensates nonprofits for the constraints they face in accessing the capital market.[65]

B. NONPROFITS AND WHY THEY FORM

It is to the benefit of any institution's customers and intended beneficiaries to understand the alternative organizational forms available, given the corresponding differences in institutional behavior that are expected to arise. Several theories have been advanced to explain the existence of nonprofits. This Part will discuss the following four theories and evaluate their applicability to Burning Man: the public good theory, the contract failure theory, credible

61. *See* Henry B. Hansmann, *The Effect of Tax Exemption and Other Factors on the Market Share of Nonprofit Versus For Profit Firms*, 40 NAT'L TAX J. 71, 71 (1987) [hereinafter Hansmann V].
62. *See id.*
63. Weisbrod I, *supra* note 58, at 69, 74–75.
64. *See id.* at 74.
65. *See* Hansmann II, *supra* note 2, at 55.

signaling of altruism, and subsidy theory. The purpose of this discussion is to give an analytical rationale to the visceral discomfort shared by many upon finding out that Burning Man is operated as a LLC and not as a nonprofit. The key takeaway is this: The credible signaling of altruistic commitment combined with favorable treatments like tax exemption and grant availability provide the best reasons for Burning Man's conversion to the nonprofit form. These pro-conversion reasons, however, do not rule out the possibility that Burning Man's mission *can* thrive in its current LLC form.

The consumer control theory for why nonprofits form should be acknowledged, albeit briefly: Patrons of an exclusive social club, even if they are in the position to judge the quality of services accurately, want to run the club as a nonprofit as a way to exert control over the organization and to prevent monopolistic membership fee pricing by the organization's owners.[66] However, the consumer control theory is not particularly applicable to the case study of Burning Man. The Project is far from an exclusive social club to begin with, and given the sheer number of participants, consumer ownership is neither feasible nor contemplated for Burning Man's current conversion to the nonprofit form.

A nonprofit organization's essential characteristic is the prohibition on profit distribution to individuals who exercise control, such as officers, directors, members, or trustees. Professor Henry Hansmann has coined a term for this characteristic: the nondistribution constraint.[67] Most nonprofits are incorporated, but some are unincorporated organizations. Given the relative ease of incorporation and the lack of statutory or case law on unincorporated organizations, the unincorporated nonprofit form is uncommon in the United States.[68]

Nonprofit organizations can be classified by their sources of income and structures of control. Nonprofits that derive most of their incomes from donations are referred to as *donative* nonprofits, while those that derive most of their incomes from sales of goods or services are *commercial* nonprofits. A nonprofit is *mutual* if the ultimate control of the organization, as manifested in the power to elect the board of directors, is held by its patrons. Nonprofits that are not mutual, especially if they have self-perpetuating boards of directors, are referred to as *entrepreneurial* nonprofits.[69] However, many

66. Hansmann I, *supra* note 2, at 33; *see* Avner Ben-Ner, *Nonprofit Organizations: Why Do They Exist in Market Economies?*, *in* THE ECONOMICS OF NONPROFIT INSTITUTIONS: STUDIES IN STRUCTURE AND POLICY 94 (Susan Rose-Ackerman ed., 1986).

67. Hansmann IV, *supra* note 59, at 838.

68. Hansmann III, *supra* note 56, at 59.

69. Hansmann I, *supra* note 2, at 28.

nonprofits straddle the lines between these categories. Burning Man would be labeled as both donative and commercial in the sense that its operation relies heavily on both donations of volunteer labor and ticket sales. Assuming that participants do not have any input in the election of board directors once Burning Man completes its LLC-to-nonprofit conversion, it would be an entrepreneurial nonprofit.

1. The Public Good Theory and Quasi-Public Goods

As first proposed by Professor Burton Weisbrod, dissatisfaction with the low level of quantity or quality of a public good[70] that caters to median tastes and heterogeneity in consumers' tastes gives rise to nonprofits.[71] In other words, nonprofits are private solutions to supplement the public sector by satisfying the residual unsatisfied demand of consumers whose tastes deviate from the median.[72] While it is true that many services with public good characteristics are provided by nonprofits, the public good theory raises two questions: (1) why do many nonprofits provide private goods rather than public goods?, and (2) why do nonprofits rather than for-profits arise to meet the residual unsatisfied demand of consumers with off-the-mainstream tastes?[73]

The experience that Burning Man offers to participants fits within the public good theory but is not a pure public good. It is more like an excludable quasi-public good: A nonrivalrous good capable of excluding nonpayers.[74] If conventional art museums and state parks can be analogized to public goods catering to the median taste, then Burning Man certainly satisfies off-the-mainstream demand with offerings like interactive art and camping in a decommoditized temporary city. However, participation at Burning Man is not a pure public good because it is excludable in the economic sense: Those who have not purchased tickets beforehand simply cannot enter the premises.

It is the general consensus that the private market is the best provider of private goods and that public goods are best provided by the public sector. With quasi-public goods like Burning Man,

70. A public good has two characteristics: nonrivalrous and nonexcludable. A good is nonrivalrous if it does not cost more to provide the good to many people than it does to provide the good to one person, and nonexcludable if it is difficult to prevent others from consumption once the good has been given to one person. *See* HELMUT K. ANHEIER, NONPROFIT ORGANIZATIONS: THEORY, MANAGEMENT, POLICY 118 (2005).

71. *See generally* BURTON WEISBROD, THE VOLUNTARY NONPROFIT SECTOR (1977).

72. Hansmann I, *supra* note 2, at 28–29; *see* Susan Rose-Ackerman, *Altruism, Nonprofits, and Economic Theory*, 34 J. ECON. LIT. 701, 716 (1996) (suggesting that "nonprofits may provide a more diverse collection of services than is possible in the public sector").

73. Hansmann I, *supra* note 2, at 29.

74. *See* ANHEIER, *supra* note 70, at 118.

however, the boundaries are not so clear. Quasi-public goods such as healthcare and social services can be provided by a variety of organizations like governmental agencies and businesses as well as nonprofits. For providers of quasi-public goods like Burning Man, whether the nonprofit form is a better institutional choice than a for-profit alternative requires an analysis of the organization's supply and demand conditions.[75] The following theories on nonprofit formation contribute to this analysis by supplementing rather than competing with the public good theory.

2. The Contract Failure Theory

Hansmann has proposed a different theory on why nonprofits arise: In situations where consumer cannot accurately judge the quality or quantity of services, they prefer to support nonprofits because the nondistribution constraint serves as a check against the management's incentive to skimp on quality for personal gains.[76] In other words, nonprofits arise as solutions to market failures in which consumers are unable to monitor producers through ordinary contractual arrangements. Hansmann calls this type of market failure "contract failures."[77] The contract failure theory is more relevant for donative nonprofits than commercial nonprofits, because donors often have no contact with the intended beneficiaries and therefore have no way to assess the quality of services provided.[78] For this reason, donors are often more willing to donate to nonprofit organizations because they feel that nonprofit management is less likely to misuse the organization's resources for private gains.[79] This is why most private donations are made to nonprofit organizations, not to for-profits or government entities.[80]

75. *See* ANHEIER, *supra* note 70, at 119.

76. Hansmann IV, *supra* note 59, at 844–45.

77. *Id.* The contract failure theory is rooted in the theme that nonprofits form in response to informational asymmetry faced by consumers. This theme had been visited in earlier works and laid the foundation for Hansmann's contract failure theory. *See generally* Richard Nelson & Michael Krashinsky, *Two Major Issues of Public Policy: Public Policy and Organization of Supply*, *in* PUBLIC SUBSIDY FOR DAY CARE OF YOUNG CHILDREN (1973) (suggesting that the prevalence of nonprofit daycare centers can be attributed to the difficulty parents have in judging a daycare center's quality of service, and the fear that for-profit daycares are more likely to provide inferior services); Kenneth Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963) (suggesting that information asymmetry between patient and healthcare providers contributes to the formation of nonprofit hospitals).

78. Hansmann I, *supra* note 2, at 30–31.

79. *But cf.* Anup Malani & Guy David, *Does Nonprofit Status Signal Quality?*, 37 J. LEGAL STUD. 551 (2008) (using evidence from a survey based on over 2800 firms in the hospital, nursing home, or child care industries to show there is no support for the hypothesis that nonprofit status signals quality).

80. *See* Rose-Ackerman, *supra* note 2, at 716.

However, the contract failure theory alone is not a convincing rationale for Burning Man's conversion to nonprofit status. Consumers are able to overcome informational asymmetry if they can directly judge the quality of an organization's services or participate in the organization's management.[81] Burners do this by living and working in Black Rock City: They apply for art grants from BRAF, volunteer their labor to the Project's management and operation, and influence the organization through consensus decision making.

Burning Man's participants, of course, do not have perfect information and control over the Project's operation. Making decisions on certain issues is simply not feasible on a consensus model, and senior organizers have the final say over decisions in areas like financial allocation. Admittedly, participants cannot judge whether the Burning Man organization is taking advantage of volunteers and participants when it has the financial capacity for paid labor and lower ticket prices instead.

This in no way implies that the Project in its current for-profit LLC form exploits volunteer labor, but simply highlights areas in which greater financial transparency and organizational accountability would make an improvement. For example, if the publicly available AfterBurn Reports include full financial disclosures combined with an explanation about the allocation of profits (if any) resulting from each event, the contract failure theory would be much less relevant.[82] But given that Burning Man can take such straightforward measures to improve financial transparency and organizational accountability while staying as a LLC, the contract failure theory on its own is not a compelling rationale for the Project's conversion to a nonprofit.

3. *Credible Signaling of Altruism*

This Part explains why the credible signaling of altruism, which is crucial for an organization that relies heavily on gift exchange as the mode for both participation and volunteer labor recruitment, provides a more persuasive reason for Burning Man's LLC-to-nonprofit conversion. Such signaling of credibility is imperative for two reasons. First, the Project seeks to create among strangers a

81. *See id.*; Ben-Ner, *supra* note 66, at 109–10 (suggesting that informational asymmetry can be overcome if consumers take control of a nonprofit firm through demand revelation, participation in the determination of the organization's goals, and monitoring the organization's performance).

82. The AfterBurn Reports do publish financial statements, but they are partial disclosures of expenditures without revenues. *See, e.g.*, *AfterBurn Report 2009: Financial Chart*, *supra* note 47. To the Project organizers' credit, the public disclosure of finances is not required by Nevada's LLC statute, so the fact that the AfterBurn Reports offer financial statements at all shows the organizers' receptiveness to greater financial transparency.

sense of trust and intimacy ordinarily reserved for intimate relationships. Second, when compared to more permanent arrangements like the household, Burning Man is a fleeting experience in which participants can exit with relative ease. The combination of these two factors puts the Burning Man organization under greater pressure to secure the participants' trust, eliminate any suspicion of impropriety, and operate in the legal form that is most consistent with its mission.

Professor Susan Rose-Ackerman has posited that the nonprofit form is favored by both altruistic consumers and ideological entrepreneurs.[83] Individuals wanting outlets for their generosity see the nonprofit form as a partial guarantee that their donations will not be misappropriated as profits, and ideologues driven by ideas rather than profit maximization see the nonprofit as a better form because it does not have to appease profit-driven investors.[84] It is true that a for-profit form can do away with investors as well, but holding all else equal, the theory goes, an organization would still prefer the nonprofit form because of its tax and regulatory benefits.[85]

The nonprofit form does not necessarily advance altruistic purposes better than for-profit forms can; it does, however, signal an organization's commitment to altruism with more credibility. Consumers are willing to patronize nonprofit organizations run by ideologues because they have two potential advantages over for-profit competitors: quality control and product differentiation. The quality control advantage arises from the assumption that an altruistic organization in the nonprofit form is more likely to attract employees sharing the same values, and such employees require less monitoring and inspire greater confidence in consumers for the quality of the final product. The nonprofit form is a signal to committed employees that their efforts are advancing altruistic goals rather than enriching investors. Some high level employees like hospital executives and lawyers have been shown to forgo higher pay in exchange for greater confidence that their works are advancing altruistic goals.[86] The

83. *See* Rose-Ackerman, *supra* note 2, at 723–24.

84. *Id.*

85. *Id.* at 719.

86. Rose-Ackerman, *supra* note 2, at 719–20. *See generally* Anne Preston, *The Nonprofit Worker in a For-Profit World*, 7 J. LAB. ECON. 438 (1989) (suggesting that white-collar workers decide to work at nonprofits for lower pay in exchange for the opportunity to produce goods with positive social externalities); Myron J. Roomkin & Burton A. Weisbrod, *Managerial Compensation and Incentives in For-Profit and Nonprofit Hospitals*, 15 J. L. ECON. ORG. 750 (1999) (suggesting that nonprofits and for-profits may attract different types of top-level managers, both because nonprofits prefer managers who share their goals and because some managers prefer working at nonprofits even if at lower pay); Burton Weisbrod, *Nonprofit and Proprietary Sector Behavior: Wage Differentials Among Lawyers*, 1 J. LAB. ECON. 246 (1983)

product differentiation advantage arises when consumers with less-than-well-formed tastes in, say, education or the arts, prefer to support ideologues with strong views, because the ideologues' professed disregard for profit maximization is a signal of the product's quality and commitment to certain values.[87] When compared to the public good and contract failure theories, credible altruism proves to be a more persuasive rationale for Burning Man's conversion to nonprofit status.[88]

A significant part of Burning Man's appeal is that the sense of community, mutual reliance, and trust it creates among strangers is rarely found outside intimate relationships. Interactions among strangers are often governed by contracts and monetized market transactions, while those among intimates like family and friends default more to gift exchanges. Among trusting intimates who are confident that spontaneous reciprocity will make everyone better off in the long run, a gift economy avoids the transaction costs entailed by negotiation and enforcement of trade terms. Spontaneous gift exchange is also in line with our socialized aversion to cash transactions among intimates, and creates a sense of reciprocity-induced satisfaction that exists independent of instrumental advantages.[89] The suspicion that Burning Man's for-profit form can be used to the organizers' private gains can severely undermine the community's faith in the gift economy, and ultimately undermine the Project's legitimacy itself.

Especially when Burners can easily exit the organization by choosing not to return next year or to leave at any point during the event, the credibility of Burning Man's organizational form can conceivably make or break its long-term survival. Unlike organizations that produce private goods, public good providers may

(suggesting that public interest lawyers have different preferences from their counterparts in the private sector and are willing to accept substantially lower pay as a result).

87. Rose-Ackerman, *supra* note 2, at 720–21.

88. *See* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 510 (1990) (arguing that altruism gives rise to nonprofits even in markets that under the orthodox theory would be more efficiently supplied by for-profits; and that these nonprofits' altruistic supply of goods and services, by virtue of being distinct from the regular market supply, is a rationale for the federal tax exemption of nonprofits); *see also* Susan Rose-Ackerman, *Altruistic Nonprofit Firms in Competitive Markets: The Case of Day-care Centers in the United States*, 9 J. CONSUMER POL. 291 (1986) (arguing that altruistic nonprofit daycare providers offer higher quality at lower prices, but the demand for these nonprofits outruns supply, thereby forcing parents to go with for-profit day care providers instead).

89. ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 104–06 (2008); *see* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1937 (1987) (advocating that market-inalienable things, which can be given away but not sold, should be evaluated on the basis of personhood and human flourishing rather than traditional liberalism or economics).

have committed members who continue to care about the quality of the organization's output even after they have left the organization. Such members would therefore seek to improve the organization whether from within or without; they would, for example, exit the organization to catalyze a radical but necessary change in the organization's operation.[90]

4. Subsidy Theories

Another plausible explanation for the proliferation of nonprofits is that they receive a variety of subsidies, including but not limited to special treatments like tax exemption, charitable deductions for donors, financing through tax-exempt bonds, and grants. Subsidy theories suggest that nonprofits form to take advantage of these subsidies, especially in industries with for-profit competitors.[91] If this is true, then to evaluate whether an altruistic organization should operate as a nonprofit from a public policy perspective, it is worthwhile to ask why nonprofits are entitled to subsidies in the first place. Professor Henry Hansmann has proposed that tax exemption for nonprofits is a subsidy justified on efficiency grounds due to the greater difficulty that nonprofits encounter in raising capital.[92] This is not as relevant for Burning Man because the Project is currently completely funded by ticket sales and has little need for other forms of capital.[93]

For tax purposes, the policy rationale underlying the favorable treatment of nonprofits appears to not just be an explicit intent to subsidize nonprofits, but also an attempt to properly define the tax base.[94] The latter base-defining rationale is illustrated by the fact that the federal tax budget does *not* treat nonprofit tax exemptions as tax expenditures. The idea is that the tax exemptions enjoyed by qualifying nonprofit organizations do not count as tax subsidies because the incomes derived by these organizations fall outside of the normal income tax base, and therefore should not be taxable in the first place.[95]

In other words, income tax exemption is not a special privilege

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90. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 98–105 (1970).

91. Hansmann I, *supra* note 2, at 33; *see* Hansmann V, *supra* note 61, at 71 (using state tax data to show that tax exemption increases the market share of nonprofits relative to their for-profit competitors).

92. *See generally* Hansmann II, *supra* note 2.

93. *See* Telephone Interview with Marian Goodell, *supra* note 34.

94. Evelyn Brody & Joseph J. Cordes, *Tax Treatment of Nonprofit Organizations: A Two-Edged Sword?*, *in* NONPROFITS & GOVERNMENT: COLLABORATION & CONFLICT 141, 152–55 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d. ed. 2006).

95. *Id.* at 153.

for nonprofits with public service missions; rather, they are exempt because they do not generate income in the sense that for-profit businesses do for their investors' benefit. Even if the concept of "income" is to deviate from the ordinary sense of the word and defined to include the financial activities of public service nonprofits, the tax burden would not accurately reflect the individual beneficiaries' abilities to pay.[96] In the case of Burning Man, this base-defining rationale takes on a particular sense of poetic justice: In the niche of decommoditization that Burning Man has deliberately carved out from our market-based economy, it does not seem right that the ticket revenues necessary to its survival are taxed like the ordinary transactions of a profit-driven corporation.

Public subsidies for the performing arts often take the form of grants in the United States. Most of these grants come in the form of matching grants conditional on private donations. Hansmann has justified grant subsidies for the performing arts on efficiency grounds.[97] His theory is that given the high fixed costs and low marginal costs of putting on a production as well as the relatively small demand, nonprofit organizations in the performing arts survive by charging high prices to patrons with the most inelastic demands. This is essentially a form of voluntary price discrimination in which patrons with the most exacting standards for quality and good seats pay the highest prices. For cases in which the opportunities for price discrimination through ticketing are limited and the cost of production exceeds donations, public subsidies in the form of grants are justified because making the production possible would be an efficient outcome.[98] This is a conceivable scenario once Burning Man becomes a nonprofit, but does not imply that the LLC is an inappropriate organizational form for the Project's mission. Despite the high costs required to make Burning Man happen, the Project seems to have managed just fine without grant subsidies and even turned a modest profit for the past three years.[99]

96. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 305, 358 (1976).

97. Henry B. Hansmann, *Nonprofit Enterprise in the Performing Arts*, 12 BELL J. ECON. 341, 360 (1981) [hereinafter Hansmann VI].

98. Hansmann VI, *supra* note 97, at 360.

99. *See* Telephone Interview with Marian Goodell, *supra* note 34; E-mail from Marian Goodell, Dir. of Bus. & Commc'ns, Black Rock Ciy LLC, to Yuan Ji, Yale Law School (Apr. 8, 2011, 01:17 EDT) (on file with author).

C. LIMITED LIABILITY CORPORATIONS

To fully appreciate the flexibility and benefits of the LLC form, it is helpful to briefly review the legal forms available to a closely held corporation like Black Rock City before the LLC became an option. A business is defined as closely held if its shares are typically owned by a few shareholders and not traded on an exchange.[100] A closely held business can take the form of a LLC, partnership, corporation, or sole proprietorship.[101] Prior to 1988, closely held businesses only had two options: Partnership or corporation. The partnership form is the default form for closely held firms with a few owners. It enjoys single-level taxation at the owner level under Subchapter K of the Internal Revenue Code ("IRC"), but subjects the owners' personal assets to unlimited liability[102] and allows each partner to dissolve the partnership at will.[103] The corporation form, designed for businesses with many owners and liquid interests, is relatively unsuited for closely held firms. It enjoys limited liability but is subject to double taxation at both the corporate and the owner level under Subchapter C of the IRC.[104] Unlike a partnership, a corporation can only be dissolved by majority shareholder and director vote.[105]

The choice between the partnership and corporation forms has several tradeoffs for closely held businesses. The default rules of both forms are such that choosing the partnership form is a tradeoff between the shareholders' direct management control and ownership liquidity. Each partner has equal rights in the management and conduct of the business; however, a partner's share of ownership cannot be transferred without the prior consent of other owners.[106] In

100. Bennedsen & Wolfenzon, *The Balance of Power in Closely Held Corporations*, 58 J. FIN. ECON. 113, 113–14 (2000).

101. RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING: § 11.02 (CCH, 2009).

102. Larry E. Ribstein & Bruce H. Kobayashi, *Choice of Form and Network Externalities*, 43 WM. & MARY L. REV. 79, 83–84 (2001). The restriction of a business's creditors' recovery to only business assets and not to the owners' nonbusiness personal assets is commonly referred to as "limited liability." The partnership form's unlimited liability is not ideal for business owners since most of them can be expected to prefer limited liability. *Id.* at 83.

103. *See, e.g.*, Nev. Rev. Stat. §§ 87.310(1)(b) & 87.310(2) (1999) (stating conditions under which a partnership can be dissolved "by the express will of any partner").

104. A corporation is subject to double-taxation by default unless it qualifies and choose to incorporate as a S corporation under Subchapter S of the IRC. A S corporation functions like a partnership for federal taxation purposes in the sense that it passes corporate income, income, losses, deductions, and credit to the shareholders' personal tax returns at their respective individual income tax rates. *See S Corporations*, IRS (Aug. 24, 2012), http://www.irs.gov/businesses/small/Note/0,,id=98263,00.html; Ribstein & Kobayashi, *Choice of Form and Network Externalities*, *supra* note 103, at 84.

105. *See, e.g.*, Nev. Rev. Stat. § 78.575.

106. UNIF. P'SHIP ACT § 401 (f), (i) (1997). Section 401 of the 1997 Uniform Partnership Act

contrast, corporate shareholders have little direct management authority but can easily exit by selling their shares. Relatively speaking, the partnership form's default rules are better suited for closely held businesses because it is often the case that an organization with a few owners would prefer direct management control, enjoy the lack of double taxation, and not care too much about the ease of ownership transferability. However, choosing the partnership form comes with two undesirable features: unlimited liability and dissolution at the will of a single partner.

In 1988, the IRS approved for the first time partnership tax treatment for a Wyoming LLC because the LLC did not possess a majority of the four legal characteristics of a corporation for federal taxation purposes.[107] The significance was that a LLC could now enjoy limited liability without double taxation, and a flurry of LLC statutes, LLC formations, and laws recognizing foreign LLCs followed in other states in the early 1990s.[108] The Limited Liability Partnership ("LLP"), a form similar to the LLC, began developing shortly afterward and was recognized in almost all states by 1998.[109] The federal income taxation treatments of LLPs and LLCs are roughly identical. The most significant difference between the two forms is that LLP laws are part of state partnership laws, thereby linking LLPs to the existing network of partnership law and practice.[110] This article will not focus on the LLP form for two reasons: (1) the rationales driving Burning Man's current conversion to a nonprofit form make any discussion of alternative for-profit forms like the LLP moot to some extent, and (2) the LLC appears to be a superior alternative to the LLP in most states.[111]

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defines many of the default rules for partnerships, but partners can always deviate from the default by making contrary agreements as provided by Section 103. UNIF. P'SHIP ACT, Comment to § 401.

107. Rev. Rul. 88-76, 1988-2 C.B. 360. The Ninth Circuit held in *United States v. Kintner*, 216 F.2d 418 (9th Cir. 1954) that an association of doctors, by virtue of possessing more corporate than partnership-like attributes, should be taxed like a corporation despite its organization as a partnership under state law. In response, the Commissioner of the IRS enacted the *Kintner* regulations to limit the scope of corporate tax treatment by defining the four essential characteristics of a corporation: continuity of life, free transferability of interest, limited liability, and centralized management. *See* Treas. Reg. § 301.7701-2(a)(2) (1996).

108. Ribstein & Kobayashi, *supra* note 103, at 86; Larry Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 4, 34 (1995).

109. ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT § 1.01 (2000).

110. Ribstein & Kobayashi, *supra* note 103, at 87.

111. *See, e.g.*, *id.* at 121–23 (using state data to show that except in states that significantly disadvantage the LLC form in tax treatment or by complex statutes, most firms prefer the LLC form to the LLP. This implies that the benefits of an organization form's default rules, rather than network externalities such as that arising from the LLP form's linkage to existing networks of state partnership law, drive a business's choice of organizational form.).

D. HYBRID FOR-PROFIT/NONPROFIT FORMS

The nonprofit and the LLC are not the only legal forms available to Burning Man. Within the past few years, many states have started experimenting with the low-profit LLC ("L3C"), a hybrid for-profit/nonprofit legal form that combines the LLC's flexibility with the nonprofit's socially beneficial objective. To qualify as a L3C, a company must further one of the charitable or educational purposes found under Section 170(c)(2)(B) of the Internal Revenue Code and not have profit making as its primary purpose.[112] Vermont was the first state to statutorily recognize the L3C form in 2008, and many states have since followed suit by adopting or considering similar legislation.[113] In April 2010, Maryland became the first state to pass legislation that allows organizations to incorporate as Benefit Corporations ("B Corporations"), a for-profit legal form with a commitment to social responsibility.[114] As of November 4, 2012, statutes for B Corporations have been adopted in at least ten states: California, Louisiana, Illinois, South Carolina, Maryland, New York, Vermont, Virginia, Hawaii, and New Jersey; B Corporation legislation is currently under some stage of consideration in at least fourteen other states and Washington D.C.[115]

A hybrid form like the L3C or B Corporation could be a good fit for Burning Man under the laws of Nevada or California (where Black Rock City LLC's office is located) in the near future. Incorporating under the laws of the state in which an organization is physically located or does most of its business comes with certain advantages, such as the goodwill it generates in the local community

112. *See* VT. STAT. ANN. tit. 21, § 3001(27)(A), (B) (2009).

113. Following Vermont's footsteps, Illinois, Louisiana, Maine, Michigan, North Carolina,Utah, and Wyoming have enacted legislations recognizing the L3C legal form. *See* 805 ILL. COMP. STAT. ANN. 180/1-26 (West 2010); LA. REV. STAT. ANN. § 12:1302(C) (2010); ME. REV. STAT. tit. 31, § 1611 (2011); MICH. COMP. LAWS ANN. § 450.4102(m) (West 2010); N.C. GEN. STAT. ANN. § 57C-2-01 (West 2011); UTAH CODE ANN. § 48-2c-412 (West 2009); WYO. STAT. ANN. § 17-29-102(a)(ix) (West 2010). As of April 2011, state laws allowing the formation of L3C are pending in Arizona, Arkansas, Colorado, Georgia, North Dakota, Oregon, and Tennessee. *See, e.g.*, S.B. 1503, 50 Leg., 1st Reg. Sess. (Az. 2011), *available at* http://www.scribd.com/doc/50002464/SB-1503-Senate-Engrossed-Version-Arizona-State-Legislature-via-MyGov365-com.

114. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, BUSINESSWEEK (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_ business/archives/2010/04/benefit_corp_bi.html.

115. *Passing Legislation*, CERTIFIED B CORP., http://www.bcorporation.net/what-are-b-corps/legislation (last visited Nov. 4, 2012) (showing that as of November 2012, the following states are working on passing B Corporation legislation: Oregon, Nevada, Arizona, Colorado, New Mexico, Texas, Alabama, Georgia, Florida, Iowa, Wisconsin, Michigan, Pennsylvania, and Connecticut); *see.*, *e.g.*, VT. STAT. ANN. tit. 11A, §§ 21.01–21.14 (2010).

and convenience in the event of litigation. Nevertheless, a hybrid form that proves to be particularly successful and aligned with Burning Man's mission still deserves the organizers' consideration even if it entails incorporation under the laws of a foreign state. At this point though, it is still too early to evaluate the merits of the L3C and B Corporation forms.[116]

IV. DEFENSE AND RECOMMENDATIONS FOR BLACK ROCK CITY LIMITED LIABILITY CORPORATIONS

A. DEFENSE OF BURNING MAN'S LLC ORGANIZATIONAL FORM

The rationales for converting to the nonprofit form in Part III.B, however legitimate, do not invalidate Burning Man's viability as a LLC capable of staying true to its altruistic mission. For one thing, it makes sense to confer ownership of the LLC to a few individuals who have contributed substantial capital in the form of steady involvement and labor since Burning Man's early days. Even the founders and patrons of the most idealistic, noncapitalistic intentional communities have adhered to the custom of conferring community ownership to the most substantial providers of capital.[117] Advocates of co-housing favor, at least in the beginning stage of new communities, the LLC form with ownership allocated in proportion to individual contributions of capital.[118]

It is true that despite its commitment to decommodification, Burning Man engages in commercial activities like ticket, ice, and coffee sales. Commercial activities alone, however, do not mean that Burning Man is incapable of carrying out its altruistic mission as a LLC. Profit making can be the means to a not-for-profit end, and even some nonprofit organizations charge fees for the services they provide.[119] Running the Project in its current magnitude has required

116. *Cf.* J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 274 (2010) (criticizing the L3C as an empty form without changes to federal program-related investment rules in the Internal Revenue Code).

117. ELLICKSON, *supra* note 89, at 69–73.

118. *Id.* at 73; CHRIS SCOTTHANSON & KELLY SCOTTHANSON, THE COHOUSING HANDBOOK: Building A Place for Community 167–78 (2005).

119. Richard Steinberg & Burton A. Weisbrod, *Pricing and Rationing by Nonprofit Organizations with Distributional Objectives*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 65, 66, 81 (Burton A. Weisbrod ed., 1998).

an annual budget of roughly $14 million to $15 million in the past two years, and it is hard to imagine where the bulk of that budget would come from absent ticket sale revenues. Coffee sales, the justification for which is admittedly less clear in Burning Man's no-cash economy, break even; and the profits from ice sales are given back to the community as charitable contributions to local organizations.[120]

With previous adjustments like the nontransferability provision in its operating agreement and disclosure of expenditures in the annual AfterBurn Reports, the Burning Man organization has gone above and beyond the requirements expected of conventional LLCs. These actions demonstrate that the organization is willing to make structural changes so as to take a clear stance on its values, increase organizational transparency, and hold itself generally accountable to the community's sentiments on how Burning Man should be run.

Furthermore, it gives back to the community by maintaining a network of regional leaders who engage with local populations in cities all over the world and hosting an annual Regional Network Leadership Summit that supports and connects community leaders.[121] It hosts office space for two nonprofits in its San Francisco office building, promotes art by allocating funding to its nonprofit branch BRAF, makes cash donations to local civic and charitable organizations.[122] Recently within the last two or three years, Burning Man's combined charitable giving have exceeded the maximum level of charitable giving deductions allowed on its federal tax return; it has kept on giving anyway without cutting back on the amount of donations.[123] In short, absent concrete evidence of ways in which Burning Man's current for-profit form is restricting its altruistic mission, it seems to be doing just fine as a LLC.

There are a few improvements that the organization can make for better financial transparency and greater organizational accountability to the community. The financial charts currently available in the annual AfterBurn Reports only disclose expenditures, not ticket sales or other forms of revenues. When I brought up this issue with Marian Goodell, she told me that the organization has no

120. *See* DOHERTY, *supra* note 10, at 123; *see Burning Man Board*, *supra* note 30.

121. *AfterBurn Report 2010: Regionals Report*, BURNING MAN, http://afterburn.burningman. com/10/communications/regionals.html (last visited Nov. 10, 2012).

122. *See AfterBurn Report 2009: Financial Chart*, *supra* note 47 (showing an allocation of $362,000 to artist honoraria for the 2009 event); Andie Grace, *Burning Man's Charitable Donations for 2010*, THE BURNING BLOG (Dec. 20, 2010), http://blog.burningman.com/news/burning-mans-charitable-donations-for-2010; Telephone Interview with Marian Goodell, *supra* note 34.

123. Telephone Interview with Marian Goodell, *supra* note 34. Section 170(b)(2)(A) of the Internal Revenue Code limits charitable contribution deductions to 10 percent of the corporate taxpayer's taxable income. I.R.C. § 170(b)(2)(A) (2010).

problem with increased financial transparency.[124] The Special Recreation Permit the Bureau of Land Management grants to Burning Man, however, stipulates the maximum average number of participants allowed per day. If the peak population exceeds this maximum to the point of overwhelming infrastructural resources, the organization is required to provide contingency plans to account for the additional attendants.[125]

The problem is that since a significant number of participants do not stay for the full duration of the event, the number of tickets sold would almost always be greater than the number of Burners physically present at any given moment. In this context, the publication of ticket revenues would give an inflated estimate of the average daily level of attendance, thereby inviting unwarranted scrutiny from the Bureau of Land Management. The more transparent action would be to give full financial disclosure of ticket sales and negotiate with the Bureau of Land Management to reach a more realistic estimate of daily attendance. It seems that the Burning Man organization, in renewing its Special Recreation Permit for 2011-2015, has already taken such steps in its negotiations with the Bureau of Land Management.[126]

The second area for improvement is the current lack of restraint on organizers' salaries. The operating agreement's non-transferability provision, while a step in the right direction, is not equivalent to a guarantee against unreasonably excessive management compensation. To reassure the community against the possibility of self-dealing in a for-profit legal form, the key organizers could add another provision to the operating agreement that pledges to cap their salaries and bonuses (if any) to below a fixed threshold. A salary cap provision is the functional equivalent of the nondistribution constraint that characterizes nonprofits.

124. Telephone Interview with Marian Goodell, *supra* note 34.

125. *Burning Man 2011 Special Recreation Permit Stipulations 1*, BUREAU OF LAND MGMT., http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/winnemucca_field_office/nepa/recreation/0.Par.49008.File.dat/2011%20SRP%20Stips.pdf (requiring the 2011 Burning Man to manage its tickets sales so as to not overtax the infrastructure, which is designed for an average of 50,000 participants per day).

126. *See* Letter from Rolando Mendez, Field Manager, Black Rock Field Office, Bureau of Land Mgmt., to Interested Public (Nov. 1, 2010) (on file with author) (seeking public input on whether Burning Man's Special Recreation Permit renewal for 2011-2015 should be allowed to increase the maximum population size from 50,000 to 60,000 in phases over the five-year span).

B. THE BENEFITS AND PITFALLS OF NONPROFIT STATUS

With a few adjustments like full financial disclosure, a pledge to cap its key organizers' salaries below a fixed threshold, and the addition of an external advisory group, Black Rock City LLC would essentially be functioning as a nonprofit. Holding all else equal and given the rationales for conversion outlined in Part III.B, Burning Man's transition to a nonprofit entity shows that as an altruistic organization evolves and matures, its best choice of organizational from can transform as well. This Part further analyzes the nonprofit structure's benefits and caveats for Burning Man.

1. Preservation of Altruistic Legacy, Tax Benefits, and Access to Grant Funding

Nonprofits that operate under one of the qualifying purposes set out in Section 501(c)(3) of the IRC enjoy federal income tax exemption. As a charitable provider of quasi-public goods and community enrichment, Burning Man will certainly qualify as a tax-exempt 501(c)(3) nonprofit and want to take advantage of the corresponding tax benefits.[127] This will require the specification of at least one tax-exempt purpose upon formation as a 501(c)(3) nonprofit, which will commit successive boards of directors to operating Burning Man in accordance with its founding values as enshrined in the Ten Principles, thereby preserving its altruistic legacy beyond the lifetimes of the current LLC members.[128] At the state and local levels, almost all nonprofits are exempt from property, sales, and corporate income taxation.[129] The transition to nonprofit status would result in a significant tax savings if Black Rock City LLC, the subsidiary of the newly formed nonprofit, liquidates into the nonprofit parent entity.[130]

In addition to tax exemption at the federal, state, and local levels, private donations to 501(c)(3) nonprofits are tax-deductible up to specified maximums in the form of percentages of donors' adjusted gross incomes.[131] This means that Burning Man's nonprofit status will

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127. "Charitability," one of the exempt purposes set out by Section 501(c)(3), is used in its generally accepted legal sense and includes, among others things, lessening the burdens of government and combating community deterioration. *Exempt Purposes*, I.R.C. § 501(c)(3), IRS, *available at* http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/Exempt-Purposes---Internal-Revenue-Code-Section-501(c)(3) (last accessed Nov. 10, 2012).

128. E-mail from Marian Goodell, *supra* note 99.

129. Hansmann V, *supra* note 61, at 72.

130. Burning Man had paid an estimated annual average of $550,000 in federal and state taxes during 2008-2010. E-mail from Marian Goodell, *supra* note 99.

131. *See* IRS, PUB. NO. 526, CHARITABLE CONTRIBUTIONS, at 13 (2011), *available at* http://www.irs.gov/pub/irs-pdf/p526.pdf (specifying that the amount of deduction for an

provide additional incentive for charitable contributions from private individuals and organizations. As a nonprofit, Burning Man will also have access to public and private grants that it would not be eligible for as a for-profit corporation, thereby facilitating the expansion of its existing altruistic projects.

2. The Caveats of the Nonprofit Form

The nonprofit form alone is not a guarantee of altruistic commitment. Self-serving nonprofits can thwart the nondistribution constraint by paying excessive salaries to their managers and directors. In general, there are more opportunities for abusive arrangements like self-dealing, nepotism, and favoritism in the nonprofit sector because it lacks the financially motivated takeover bids that constrain such abuse in for-profit firms.[132] Determining whether a manager's compensation is competitive or violates the nondistribution constraint, which is especially difficult to enforce in small firms, is no easy task.[133] Professor Burton Weisbrod has warned against the possibility of "for-profits in disguise"—organizations that act no differently from profit-maximizing firms but elect the nonprofit form since enforcement is costly and detection is not easy.[134] The government does not devote substantial resources to the monitoring and enforcement of the nondistribution constraint for nonprofit organizations; and even if it did, stealthy distributions of excessive salary to managers and directors can be difficult to detect.[135]

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individual's charitable contributions is limited to 50 percent of adjusted gross income, and may be limited to 30 percent or 20 percent of adjusted gross income depending on the type of property donated and the type of organization receiving the contribution). For corporate donors, the cap on tax-deductible charitable contributions is 10 percent of taxable income. I.R.C. § 170(b)(2)(A) (2010).

132. Steinberg & Weisbrod, *supra* note 120, at 76. *Cf.* Susan Rose-Ackerman, *Ideals Versus Dollars: Donors, Charity Managers, and Government Grants*, 95 J. POLIT. ECON. 810 (1987) (arguing that a lump-sum increase in grant funding will reduce the organization's accountability to private donors and not go entirely toward an increase in output).

133. Weisbrod, *supra* note 59, at 72.

134. BURTON A. WEISBROD, THE NONPROFIT ECONOMY 11–13 (1988).

135. Steinberg, *Economic Theories of Nonprofit Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 126 (Walter W. Powell ed., 2006). *Accord* Norman I. Silber, *Nonprofit Interjurisdictionality*, 80 CHI.-KENT L. REV. 613, 638–39 (2005) (suggesting that inadequate monitoring and enforcement of nonprofit law results, at least in part, from the overlap of state and federal authorities and from their failure to formally assign principal responsibilities). Both federal and state laws impose limitations on nonprofit compensation. Private inurement rules, which forbid the private ownership of nonprofits in any degree, are enforced at the federal level by both Treasury regulations and an excise tax imposed on organization insiders who violate the prohibitions. At the state level, this prohibition is generally imposed through statutory nondistribution requirements for nonprofits. Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 95 (2012); *see* I.R.C. §§ 501(c)(3), 4958 (2006 & Supp. I 2007); Treas. Reg. § 1.501(c)(3)-1(b)(4), (c)(2) (2008). In addition to limitations on the reasonableness

The second pitfall of nonprofits is that they are not immune from commercialization. A number of nonprofits have started to behave more like for-profits by increasingly relying on fees and contracts and less on donations and grants to fund their core missions.[136] Holding all else equal, greater access to donations and grants translates to a greater ability to offer lower ticket prices and subsidized tickets; it seems then that the Burning Man organization has a duty to its community of participants and volunteers to resist commercialization without good reason. Commercialization in and of itself does not have a to be a source of alarm, as nonprofits with significant sources of commercial funding can still stay true to altruistic missions. Burning Man after all is funded primarily by ticket sales and there is no evidence that this commercial aspect of its operation has crippled its altruistic commitment. However, if the Project takes its pledge to decommodification seriously, and if part of the rationale for its LLC-to-nonprofit transition is increased access to grant funding and donations, then its organizers should not only understand but also anticipate the factors driving the trend toward commercialization in the nonprofit sector.

The trend toward commercialization among nonprofit art museums may serve as an appropriate case study for Burning Man's future management. Art museums are unlike healthcare organizations or science and technology museums in that they neither depend on the government as the primary financial customer nor compete with for-profits; it is therefore less obvious why art museums would gravitate toward commercial funding over donations and grants.[137] Four possible reasons have been proposed for the commercialization of nonprofit art museums. First, new resources often support specific acquisitions or projects rather than general operations, but the resulting expansion increases the museum's operating costs nonetheless. Second, personnel costs make up a large part of art museums' operating expenses, but patrons often prefer to

of nonprofit executive pay and private inurement restrictions, there is a third type of federal limitation on nonprofit compensation: Treasury regulations also impose private benefit restrictions that protect the charitable purposes of nonprofits and prohibit anything other than incidental benefits to private parties. James R. Hines, Jr. et al., *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1195 & n.74 (2010); *see* Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2008).

136. J. Gregory Dees, *Enterprising Nonprofits*, HARV. BUS. REV., Jan. 1, 1998, at 54, 55–56. For a collection of studies on the reasons and consequences of why nonprofits are behaving more like for-profit firms by shifting primary funding sources from charitable donations to commercial activities, *see generally* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR (Burton A. Weisbrod ed., 1998).

137. Helmut K. Anheier & Stefan Toepler, *Commerce and the Muse: Art Museums Becoming Commercial?*, *in* TO PROFIT OR NOT TO PROFIT: THE COMMERCIAL TRANSFORMATION OF THE NONPROFIT SECTOR 233, 235 (Burton A. Weisbrod ed., 1998).

direct their donations and grants to specific projects like collections or buildings instead. Third, the museum's vision and the funding needs that vision entails are not always in line with the goals of private and institutional donors, thereby making alternative financing necessary. Finally, government support for the arts seems to have reached its peak in the 1990s before its subsequent decline.[138]

C. RECOMMENDATIONS FOR BURNING MAN'S FUTURE

This Part summarizes the recommendations made thus far for these three phases of Burning Man's operation: the current LLC, the LLC-to-nonprofit conversion, and the future nonprofit entity. Organizational transparency is a recurrent theme in the recommendations to follow. In its current capacity as a LLC, Black Rock City can improve organizational accountability by making a full disclosure of finances in its annual AfterBurn Reports and by adding a provision that caps management compensation to a reasonable level to its operating agreement. If the reason behind the current partial financial disclosure is that the publication of ticket revenues would inflate the estimate of average daily attendance and invite unnecessary attention from the Bureau of Land Management, then the accountable solution is to negotiate with the Bureau of Land Management a more realistic method of estimating attendance, not to omit the disclosure of ticket revenues altogether. Similar to the nondistribution constraint that characterizes nonprofits, a provision that ensures against excessive management compensation would give extra reassurance to the Burning Man community that a for-profit organization can still credibly serve its altruistic purposes.

As the Project transitions to a nonprofit structure, organizers should make sure that the conversion process is transparent. In the event that organizers decide to liquidate the LLC after it is transferred into the nonprofit, they should be mindful that the phase in which the nonprofit entity acquires the LLC by buying its ownership from the LLC's members is especially prone to abuse. The Burning Man organization should take extra care to communicate to the community that the acquisition price paid is reasonable, and also to disclose the metrics used for determining reasonableness. Continued vigilance toward transparency is necessary even after

138. *Id.* at 236–37. *See* Toby Miller, *The National Endowment for the Arts in the 1990s*, 43 AM. BEHAV. SCIENTIST 1429, 1441–43 (2000) (citing a decline in corporate support of the arts during the 1990s and criticizing the National Endowment for the Arts as an inadequate supporter of democratic cultural capital because of its tendency to prioritize institutional Old World values over immigrant and popular culture).

Burning Man fully transitions to a nonprofit entity, because the nonprofit form is not immune from abusive practices and commercialization.

Admittedly, commercial sources of funding like ticket sales are sometimes necessary and not contrary to altruistic missions. That said, if an organization is committed to decommodification and changes its legal form partially to access previous unavailable grants and donations so as to expand the scale of its altruistic mission, it should be wary of, and resist, commercialization absent good cause. Finally, BRAF, Burning Man's nonprofit branch dedicated to the funding of art projects, should stay a separate entity after the parent organization fully converts to a nonprofit structure. There are conceivably private and institutional donors who are only or primarily interested in supporting the Project's artistic component, but Burning Man's mission is broader than the advancement of the arts. Keeping BRAF as a separate nonprofit entity has the benefit of retaining the support from this narrower segment of the donor pool for Burning Man's future.

V. CONCLUSION

An organization like Burning Man that is not driven by profit but ideologically committed to altruism and the provision of public goods can still thrive in a for-profit form. The nonprofit form is not the only or even the best structure for such organizations, particularly if they are young organizations in the early days of formation. As an organization evolves and becomes more complex overtime, however, the organization form that best serves its mission can change as well. In Burning Man's case, the need to credibly signal its commitment to altruism and access to public subsidies are persuasive rationales for its current conversion to nonprofit status. Still, the nonprofit form alone is neither a guarantee of altruistic commitment nor an immunization from self-dealing practices among the management staff or board of directors. Burning Man can improve organizational accountability by making the LLC-to-nonprofit conversion process transparent to the community, and resisting commercialization absent good cause after it becomes a fully functional nonprofit organization.

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