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## Building Policy Through Collaborative Deliberation: A Reflection on Using Lessons From Practice to Inform Responses to the Mortgage Foreclosure Crisis

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# Building Policy Through Collaborative Deliberation: A Reflection on Using Lessons From Practice to Inform Responses to the Mortgage Foreclosure Crisis

## **Cover Page Footnote**

Yale Law School Research Scholar in Law, Ludwig Community Development Fellow, and Selma M. Levine Clinical Lecturer in Law

**BUILDING POLICY THROUGH COLLABORATIVE  
DELIBERATION: A REFLECTION ON USING  
LESSONS FROM PRACTICE TO INFORM  
RESPONSES TO THE MORTGAGE  
FORECLOSURE CRISIS**

*Robin S. Golden\**

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**INTRODUCTION**

In the early days of awareness regarding the current foreclosure crisis, industry experts and observers suggested that the foreclosure problem was limited to a few areas like the Midwest, California, Florida, and Arizona.<sup>1</sup> These experts and observers questioned the data<sup>2</sup> and predicted that the economy would improve by the end of 2007.<sup>3</sup> Even then, some in the federal government like Sheila Bair, Chairperson of the Federal Deposit Insur-

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1. Maya Roney, *Is the Foreclosure Crisis Real*, BLOOMBERG BUS.WK. (June 14, 2007, 8:45 PM), [http://www.businessweek.com/bwdaily/dnflash/content/jun2007/db20070614\\_838245.htm](http://www.businessweek.com/bwdaily/dnflash/content/jun2007/db20070614_838245.htm).

2. See *Organization Accused of Plumping Foreclosure Numbers for News Media and Congress*, eFINANCEDIRECTORY (July 30, 2007), [http://efinancedirectory.com/articles/Organization\\_Accused\\_of\\_Plumping\\_Foreclosure\\_Numbers\\_for\\_News\\_Media\\_and\\_Congress.html](http://efinancedirectory.com/articles/Organization_Accused_of_Plumping_Foreclosure_Numbers_for_News_Media_and_Congress.html) (noting that many economists believed the foreclosures number of 2007 to be "overstated").

3. See John Kroll, *Foreclosure Prediction for 2008: 1.4 Million Homeowners*, PLAIN DEALER BLOG (Nov. 27, 2007, 5:00 AM), [http://blog.cleveland.com/pdworld/2007/11/foreclosure\\_prediction\\_for\\_200.html](http://blog.cleveland.com/pdworld/2007/11/foreclosure_prediction_for_200.html) (predicting that the crisis will not get worse than 2007 for the Midwest).

ance Corporation (FDIC), recognized the need for quick action to reduce the number of foreclosures.<sup>4</sup> Unfortunately, federal responses were and continue to be insufficient. As Julia Gordon at the Center for Responsible Lending explained in her congressional testimony in October 2010: “Things did not need to be this bad. If the Bush Administration had moved quickly back in 2007, or if the Obama Administration and Congress had acted more forcefully in early 2009, we could have significantly limited the breadth and depth of the foreclosure crisis.”<sup>5</sup>

Instead of abating, the foreclosure crisis has turned into an economic crisis. Today, job loss now pushes many homeowners with prime mortgages into foreclosure,<sup>6</sup> while continuing market decline leaves others owing more on their mortgages than their homes are worth. Current estimates have twenty-five percent of houses “underwater,” and some analysts predict as much as forty-eight percent of all residential properties nationwide will have a negative equity between their mortgage balances and their property values before the housing market recovers.<sup>7</sup>

A major challenge has been the unwillingness of servicers to modify at-risk and delinquent mortgages early, appropriately, and on a large enough scale to contain the crisis. The federal government has been unsuccessful to date in motivating servicers to make the kinds of changes to mortgages that would make them affordable in the long-term to homeowners.<sup>8</sup> As

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4. Les Christie, *FDIC Chief: Intervene on Foreclosures*, CNNMONEY.COM (Dec. 2, 2008, 8:18 PM), [http://money.cnn.com/2008/12/02/real\\_estate/Bair\\_on\\_bailouts/index.htm](http://money.cnn.com/2008/12/02/real_estate/Bair_on_bailouts/index.htm); see also Sheila C. Bair, Editorial, *Fix Rates to Save Loans*, N.Y. TIMES, Oct. 19, 2007, <http://www.nytimes.com/2007/10/19/opinion/19bair.html> (discussing the need for action to minimize foreclosures).

5. *HAMP, Servicer Abuses, and Foreclosure Prevention Strategies: Hearing Before the Cong. Oversight Panel for the Troubled Asset Relief Program*, 111th Cong. 2 (2010) [hereinafter *Hearing*] (statement of Julia Gordon, Senior Policy Counsel, Center for Responsible Lending), available at <http://cop.senate.gov/documents/testimony-102710-gordon.pdf>.

6. Alissa Figueroa, *Foreclosure Crisis Phase 2: The Negative Equity Dilemma*, CHRISTIAN SCI. MONITOR (July 12, 2010, 9:36 AM), <http://www.csmonitor.com/Business/2010/0712/Foreclosure-crisis-phase-2-The-negative-equity-dilemma> (“[N]early 2.4 million Americans with prime loans are seriously delinquent on their mortgages.”).

7. Karen Weaver & Ying Shen, *Drowning in Debt*, DEUTSCHE BANK (Aug. 5, 2009), <http://www.virtualbroker.com/2009/08/drowning-in-debt.html> (follow link to PDF).

8. In its June 2010 report, the U.S. Government Accountability Office detailed several shortcomings in the U.S. Treasury’s oversight of servicers and servicers’ treatment of borrowers. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-634, TROUBLED ASSET RELIEF PROGRAM: FURTHER ACTIONS NEEDED TO FULLY AND EQUITABLY IMPLEMENT FORECLOSURE MITIGATION PROGRAMS (2010); see also U.S. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-005, FACTORS AFFECTING IMPLEMENTATION OF THE HOME AFFORDABLE MODIFICATION PROGRAM 12-14 (2010) [hereinafter

Gordon noted, “the government put forth a series of initiatives that relied on voluntary actions from servicers in return for targeted monetary incentives. In evaluating how well this approach has worked, the facts speak for themselves.”<sup>9</sup>

These challenges and other policy failures should have been aggressively addressed early in the crisis. They were not. Is the federal government too far removed from a feedback loop on its own policies? Or, is the information getting in but no one is acting on it? The challenge of gathering and interpreting accurate feedback from local sources at the national level may seem insurmountable. Without such a feedback loop, however, federal programs cannot adjust and will ultimately be minimally effective, particularly in areas like housing markets that are so locally determined. I have been both an actor on the local level, trying to address the crisis, and an observer of the failure of federal policies to effectively respond to the crisis.<sup>10</sup> In the last two quarters of 2010, I also had the privilege of working on a collaborative process using lessons learned at the local level to assess existing policies and develop recommendations for new policies to address this continuing crisis. This essay is a reflection on the power of this

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SIGTARP, FACTORS AFFECTING HAMP IMPLEMENTATION] (discussing resistance by servicers to government efforts to achieve principal reductions).

9. *Hearing, supra* note 5, at 12; *see also* Patricia A. McCoy, *Barriers to Federal Home Mortgage Modification Efforts During the Financial Crisis* (Oct. 15, 2010) (unpublished manuscript) (presented at the *Fordham Urban Law Journal* 2010 Cooper-Walsh Colloquium) (“[T]he resistance to permanent modifications may also be the product of accounting rules that require immediate write-downs for reductions in interest rates or principal that are permanent in nature, rather than temporary . . . . If the latter is the case, then stronger medicine will be needed. Short of overhauling the accounting rules—which raises larger complications of its own—the government’s options are limited. Either it will have to further subsidize losses arising from write-downs, compel write downs by law, or encourage voluntary write-downs through stronger means, including the threat of bankruptcy cram-downs or slower access to foreclosure court.”). At the time of the Colloquium, Professor McCoy was the Connecticut Mutual Professor of Law and Director of the Insurance Law Center at the University of Connecticut. However, she had already been hired to build the division of the new federal Consumer Financial Protection Bureau that will concentrate on protecting consumers against mortgage fraud and in their dealings with mortgage lenders and servicers.

10. A major stumbling block to aggressive action by federal actors (both legislators and government officials) centers on concerns about “moral hazard.” If servicers are “required” to take more drastic steps to allow homeowners (who may have “bought more house than they could afford”) to stay in their homes (i.e., principal reductions tied to actual property value), what about those homeowners who successfully struggled to continue to pay their mortgage? One observer suggests that, even if moral hazard should have been considered when most homeowners impacted had subprime mortgages, the same is not true now when prime mortgage holders are suffering from the results of the economic crisis. *See* David Coates, *The Foreclosure Crisis That Will Not Go Away*, TALKINGPOINTSMEMO.COM (Aug. 1, 2010, 6:10 PM), <http://tpmcafe.talkingpointsmemo.com/talk/blogs/c/o/coatesd/2010/08/the-foreclosure-crisis-that-wi.php>.

collaborative process and the potential to use such processes to engage and inform federal actors.<sup>11</sup>

This essay starts by examining the role of “local”—or, more accurately, the absence of such a role—in the lead up to the crisis. It then looks at the return of the local focus in the responses to the crisis and how these responses served as testing grounds for federal policy initiatives. The essay looks closely at one local response in particular—the Real Options, Overcoming Foreclosure (ROOF) project in New Haven, Connecticut.<sup>12</sup> Then, focusing on just one example, the role of the U.S. Department of Housing and Urban Development (HUD) certified counselors, the essay describes how local efforts quickly revealed the challenges that have stymied the efficacy of federal responses to the crisis.<sup>13</sup>

The essay then describes a recent example of a policy development exercise that built on and integrated lessons learned through local work. The Opportunity Funding Corporation (OFC) and its strategic partner, the Yale School of Management, led the project. It brought together more than seventy experts on various aspects of the foreclosure crisis from think tanks, advocacy groups, government, and the housing industry.<sup>14</sup> For six months,

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11. I have had experience with one successful effort on the part of the federal government in terms of receiving and acting on information from local practitioners. The Moving-To-Work (MTW) Program out of the Department of Housing and Urban Development provides certain high performing Public Housing Authorities (PHAs) flexibility in the use of their budget authority. See generally *Moving to Work (MTW)*, U.S. DEP'T OF HOUS. & URBAN DEV., <http://www.hud.gov/offices/pih/programs/ph/mtw/> (last visited Feb. 2, 2011). I was the Deputy Director of the Housing Authority of New Haven when it secured MTW status. *Id.* This program allows PHAs to identify local needs and address them in a timely way. In a recent report to Congress, HUD acknowledges the rich opportunity for learning about what works (and what does not work) in meeting affordable housing needs across a large variety of localities. See EMILY CADIK & AMANDA NOGIC, U.S. DEP'T OF HOUS. & URBAN DEV., *MOVING TO WORK: INTERIM POLICY APPLICATIONS AND THE FUTURE OF THE DEMONSTRATION 56-65* (2010), available at <http://www.hud.gov/offices/pih/programs/ph/mtw/report-to-congress.pdf>. Relevant to this essay is the role that local lessons and collaborative policy deliberation had on the creation of this program. Sunia Zaterman, the Executive Director of the Council of Large Public Housing Authorities (CLPHA), stated that “[t]he lessons learned under MTW are that locally designed programs, with input from stakeholders, can significantly improve lives and make better use of existing resources.” Press Release, Council of Large Pub. Hous. Auths., *MTW: Platform for Effective Innovation* (Sept. 20, 2010), available at [http://www.clpha.org/mtw\\_platform\\_for\\_effective\\_innovation?s=MTW](http://www.clpha.org/mtw_platform_for_effective_innovation?s=MTW).

12. For a more detailed description of this program, see generally Robin S. Golden & Sameera Fazili, *Raising the Roof: Addressing the Mortgage Foreclosure Crisis Through a Collaboration Between a City Government and a Law School Clinic*, 2 ALB. GOV'T L. REV. 29 (2009).

13. In our local experience in New Haven, the feedback loop to the state level was more successful.

14. OFC is a forty-year-old nonprofit organization focused on capital access and wealth generating methodologies for communities of color. See generally OPPORTUNITY FUNDING

the group distilled the lessons from local level work to design new and vet current proposals for stemming the crisis and rebuilding wealth in the hardest hit neighborhoods. Knowing the needs of those on the ground and then considering those needs through multiple lenses resulted in recommendations that are informed, timely, and appropriate for implementation. Again using the example of the role of counseling, the essay explores how this deliberative process used local experience to develop a robust set of policy recommendations for this area. The group's full set of recommendations was delivered to members of Congress and the Obama Administration on November 30, 2011.<sup>15</sup>

### I. THE FALL AND RISE OF "LOCAL" IN THE FORECLOSURE CRISIS

The separation of local financial institutions from direct engagement with homebuyers has been a remarkable result of the changes to the home buying process that led to the mortgage foreclosure crisis.

The home mortgage market in its traditional form, and when it worked well, was one in which personal relationships between parties involved in the transaction could trust one another and were constrained by laws created to combat discriminatory denials of credit. . . . [T]his market experienced a radical transformation, and these personal relationships gave way to more impersonal transactions.<sup>16</sup>

Think about the famous scene in *It's a Wonderful Life* when only the movie's hero George Bailey and the evil Mr. Potter stay calm when there is a run on the banks.<sup>17</sup> George saves the Bailey Savings and Loan by explaining to the crowd of anxious depositors why he cannot give them all their money back right now.

[Y]our money's in Joe's house, that's right next to yours, and then the Kennedy House and Mrs. Macklin's house and a hundred others. Why, you're lending them the money to build and then they're going to pay it

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CORP., <http://www.opportunityfundingcorporation.org> (last visited Feb. 2, 2011). OFC's Executive Director is Sharon Pratt, former Mayor of the District of Columbia. *Id.*

15. See OPPORTUNITY FUNDING CORP., OFC ECONOMIC STABILIZATION WHITE PAPER SERIES: RECOMMENDATIONS TO STEM THE FORECLOSURE CRISIS AND REBUILD WEALTH IN AMERICA'S COMMUNITIES OF COLOR (2010) [hereinafter RECOMMENDATIONS], available at [http://www.law.yale.edu/documents/pdf/News\\_&\\_Events/OFCWhitePaper.pdf](http://www.law.yale.edu/documents/pdf/News_&_Events/OFCWhitePaper.pdf).

16. Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 272 (2008).

17. IT'S A WONDERFUL LIFE (RKO Pictures 1946).

back to you as best they can. Now what are you going to do, foreclose on them?<sup>18</sup>

George was describing a process that barely exists anymore (except perhaps among community development financial institutions) where the local banker “knows” all, or at least most, of his (they were usually male) account holders. The banks made the loans, serviced the loans, and worked directly with struggling homeowners to help them save their homes. The point of this diversion is not to make the case that all mortgage-backed securities are evil, but rather to point out how far a formerly local based process has moved away from its sense of place.

One continuously evident facet of the national foreclosure crisis is that it has been an agglomeration of many local foreclosure and housing market crises. Those familiar with the crises in their own regions, states, cities, and neighborhoods tend to have the best grasp of the nature of the problems occurring in their local housing and mortgage markets. State housing finance agencies, which have been in the business of assisting modest-income homebuyers in their respective states with access to sound, responsible mortgage credit, are among those with their fingers on the pulse of the local markets in their state. Some of the obstacles in designing a nationally standardized foreclosure mitigation effort—such as those of the Bush Administration’s industry-led Hope Now effort or the Obama Administration’s Home Affordability Modification Program (HAMP) initiative—derive from the fact that they are not easily adapted to the particular needs of local communities and housing markets.<sup>19</sup>

When the foreclosure crisis hit, servicers inundated with requests for modifications were understaffed and unprepared.<sup>20</sup> But another problem with the current system is the physical separation between those “making decisions” and the homeowners, neighborhoods, and houses about which the decisions are being made. Although much can be determined about a housing market by photographs, comparable sales, and other data collection; there is nothing that replaces local knowledge. Anyone who has worked with the large servicers understands that the person negotiating

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18. *Id.* For a clip of the relevant scene from *It's A Wonderful Life*, see NemoPublius, *It's A Wonderful Life Bank Run*, YOUTUBE, <http://www.youtube.com/watch?v=Er69b4HM18> (last visited Feb. 2, 2011).

19. Dan Immergluck, *State Foreclosure Mitigation Strategies: A Comparison of Round 1 and 2 Hardest Hit Fund Plans in States with Nonjudicial Foreclosure Processes* 3 (Oct. 20, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1695217>.

20. To review how one mortgage servicer, Mortgage Modification Specialists, describes the changes that were required, see *Loss Mitigation Turnaround Time*, MORTG. MODIFICATIONS SPECIALISTS, [http://www.amnamortgage.com/loss\\_mitigation\\_turnaround\\_time.htm](http://www.amnamortgage.com/loss_mitigation_turnaround_time.htm) (last visited Feb. 2, 2011).



about the future of a particular house, on a particular street, in a particular neighborhood is likely to be hundreds, if not thousands, of miles away.<sup>21</sup>

One example of the impact that this disconnect has had on hard hit neighborhoods is the treatment of renters in properties upon which the owner has been foreclosed. The “standard” policy of servicers has been to evict tenants (even those who have been paying their rent on a timely basis) once the building has gone through foreclosure. As described in an article prepared for the servicer industry, “[s]ervicers should recognize that . . . measures extending the eviction process will result in lower third party bids at a foreclosure sale when the property is tenant-occupied because the purchaser may either have to pay more in a ‘cash for keys’ arrangement or see further diminution in value.”<sup>22</sup>

These policies, set on a national basis by large servicers, were not voluntarily adjusted despite the obvious changes in local conditions. Where foreclosed houses would remain unsold for months (like many of the hardest hit areas in this crisis), the value of having a tenant<sup>23</sup> remain in the house could mean the difference between the house being stripped of every valuable item (from the fixtures to the pipes) and the house retaining its maxi-

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21. To its credit, the Treasury Department recognized the need to allow for flexibility in meeting local needs when it developed the “Hardest Hit Fund” in February 2010. *See Housing Programs*, U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/initiatives/financial-stability/housing-programs/hhf/Pages/default.aspx> (last visited Feb. 2, 2011). In that way, it is similar to the successful Moving-To-Work (MTW) program discussed earlier, which provided public housing authorities with great flexibility in designing and funding programs (without any additional budget authority) and resulted in general lessons for use by all housing authorities. *See supra* note 11. The Hardest Hit Fund provided additional funding to a number of the areas hardest hit by the crisis. But, because regulatory flexibility was not provided, some states were restricted in how they could design their program. Florida had to revise its proposal when two out of three of the elements were deemed ineligible. *See, e.g.*, U.S. DEP’T OF THE TREASURY, FLORIDA HOUSING FINANCE CORPORATIONS—HFA HARDEST HIT FUND PROPOSAL (2010), *available at* <http://www.treasury.gov/initiatives/financial-stability/housing-programs/hhf/Documents/FL.pdf>; *see also* Immergluck, *supra* note 19, at 6 n.4. So far, and perhaps it is too soon to expect more, the programs have not revealed great successes. *See, e.g.*, Gray Rohrer, *Foreclosures Still Plague Florida: Sunshine State Had Second-Highest Number of Foreclosures in 2010*, SUNSHINE NEWS (Jan. 14, 2011), <http://www.sunshinestatenews.com/story/foreclosures-still-plague-florida> (“The [Florida Hardest Hit Fund] program’s qualification requirements and the intransigence of mortgage providers, however, has led to a sputtering start.”).

22. Nanci L. Weissgold & Morey E. Barnes Yost, *Make My Day: States Dare Services to Foreclose*, K&L GATES NEWSSTAND (Nov. 4, 2008), <http://www.klgates.com/newsstand/Detail.aspx?publication=5040>.

23. Of course it has to be a “good” tenant, one who is paying rent regularly and is not causing any destruction to the unit.

num value until resale.<sup>24</sup> A local decision-maker, understanding the implications of emptying the house versus keeping a good tenant, would make the logical choice to keep the tenant. Legislation that provides tenants with some protections has, to some extent, mitigated the negative effects of immediately emptying a property of its tenants.<sup>25</sup> Nevertheless, this practice has contributed to a significant loss of value in hard hit neighborhoods and has added to the negative impact on general quality of life.<sup>26</sup>

In many ways, this crisis has shown the importance of the local in understanding solutions on the larger level. It should not be surprising, then, that some of the most successful responses to the foreclosure crisis capitalized on local knowledge. The efforts of Boston Community Capital (BCC) and its partners reflect just one example of successful local responses.<sup>27</sup> Pioneer Community Development Financial Institutions (CDFIs) like BCC purchase troubled mortgage notes and real estate owned (or “REOs”) for resale to owner-occupants. By keeping owner-occupants in their homes, these programs reduce the stock of vacant properties, mitigate local foreclosure spirals, and help rehabilitate neighborhoods. They provide a necessary complement to the Neighborhood Stabilization Program (NSP), which provides nonprofits with funding to purchase *already vacant* properties for resale to homebuyers. Programs that prevent vacancies address a current gap in loss mitigation efforts in highly distressed communities where foreclosures often occur, even when it is not the most economically efficient outcome. These CDFIs conduct rigorous market research to identify and procure distressed assets from banks at discounts. They help restructure mortgages more in line with current market values that existing homeowners can afford. With respect to homeowners with credit scores damaged in

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24. In just one example from New Haven, a house that evicted all tenants upon foreclosure was originally valued at \$160,000 and, after being stripped of everything of value, sold for \$16,000.

25. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1660, available at <http://www.fdic.gov/news/news/financial/2009/fil09056a.pdf>.

26. Gabe Treves, *Banks Continue Mass Eviction of Tenants After Foreclosure*, CAL. PROGRESS REP. (Nov. 19, 2010), <http://www.californiaprogressreport.com/site/?q=node/8403>.

27. See *Who We Are*, BOSTON CMTY. CAPITAL, <http://www.bostoncommunitycapital.org/who> (last visited Jan. 16, 2011) (“Boston Community Capital (BCC) is a community development financial institution whose mission is to build healthy communities where low-income people live and work. We accomplish this mission by investing in projects that provide affordable housing, good jobs, and new opportunities in low-income communities, connecting these neighborhoods to the mainstream economy.”). BCC has been recognized for its strong innovative and successful locally-based responses to the crisis. *Id.*; *PBS News Hour: Boston Firm Offers Homeowners a Second Chance After Foreclosure* (PBS television broadcast Oct. 20, 2010) [hereinafter *PBS News Hour*], available at [http://www.pbs.org/newshour/bb/business/july-dec10/banker\\_10-20.html](http://www.pbs.org/newshour/bb/business/july-dec10/banker_10-20.html).

the crisis or who cannot immediately afford a new mortgage, there are programs that enable such homeowners to stay on as renters as they save towards a down payment and the ultimate repurchase of the property. For mortgage investors, offloading distressed mortgage notes and REOs can reduce the costs associated with loss mitigation efforts, lengthy foreclosure processes, and REO maintenance and disposition. In addition to extensive direct experience with homeowners, BCC also uses focus groups with local at-risk homeowners to inform the development and refinement of BCC's responses. Through purchase of properties from banks and reestablishing the original owners in a new, affordable mortgage, BCC has saved more homes than have been saved in any other city in the country.<sup>28</sup>

In New Haven, we worked to address the foreclosure crisis and learned quickly about how federal policies work on the ground and what obstacles prevent greater effectiveness of these policies.

## II. EXPERIENCE AND EVIDENCE FROM NEW HAVEN

The Community and Economic Development (CED) Clinic where I supervise students is located in a city, New Haven, with a rich history as a laboratory for the failures and successes of federal community development policies. Under the federally funded urban renewal programs, designed to address the physical signs of poverty, entire swaths of neighborhood fabric were destroyed to build highways and modern office and residential buildings. New Haven received more federal dollars per capita than any other city in the nation.<sup>29</sup> The city still shows scars from that period of "investment." On a more positive note, New Haven has two successful HOPE VI projects that transformed the worst public housing developments in the city. Further, New Haven just received a TIGER grant to start the process of "knitting-back together" the neighborhoods that were separated during urban renewal.<sup>30</sup>

New Haven has had the same mayor and the same president of Yale University for over a decade. The town-gown relationship, while never without its strains, is probably stronger now than at any other time in the

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28. *PBS News Hour*, *supra* note 27 (remarks by David Grossman, Director of the Harvard Legal Aid Bureau).

29. Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Hous. Pol'y Debate 443, 451 (2000) ("As of 1966, [New Haven] led the nation in per capita federal urban renewal funding, with \$745 per person. This was almost three times as much as any other city in the nation received." (internal citations omitted)).

30. Alex Ihnen, *New Haven Mayor Focuses on Reconnecting City, \$16 Million Tiger Grant Awarded to Remove Highway*, URBANSTL.COM (Oct. 15, 2010), <http://urbanstl.com/transportation/new-haven-mayor-focuses-on-reconnecting-city-16m-tiger-grant-awarded-to-remove-highway>.

city's history. It is not unusual for the mayor to reach out to Yale Law School clinics (most often the CED clinic) for help with particular issues.<sup>31</sup> This was also true in the fall of 2007 when Mayor John DeStefano asked our clinic to research the impending impact of the foreclosure crisis on New Haven and to help develop some proactive responses. From this, the ROOF (Real Options, Overcoming Foreclosure) program was developed.<sup>32</sup>

Although not one of the hardest hit areas like parts of Florida, Nevada, or California, the foreclosure crisis had and continues to have a significant impact on New Haven. Foreclosures increased by 130 percent just between 2005 and 2007.<sup>33</sup> Initially, the foreclosures were associated with sub-prime mortgages and focused on several struggling low income neighborhoods. As the crisis worsened, problems spread to those with prime mortgages. That the highest number of homeowners seeking counseling occurred in the first quarter of 2010 reflects the continuing issues.<sup>34</sup> The most devastating evidence of the lasting impact of this crisis on New Haven has been the enormous increase in vacant structures. In 1996, there were 1500 vacant properties in New Haven.<sup>35</sup> Through focused effort and resources, the city brought that figure down to a low of just 300 properties in 2007.<sup>36</sup> As a result of the crisis, however, there was a jump of nineteen percent in 2008 and a three-fold increase to 900 properties by 2010.<sup>37</sup>

In beginning to formulate a response in New Haven, it was clear that no single entity (not the city, nor a particular non-profit service organization) could be successful alone. The collaborative structure of ROOF, which

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31. The mayor sought assistance on such issues as opposing the demutualization of New Haven Savings Bank, which resulted in funding to support a community development bank. See Robert Solomon, *Law Students Nurture Low-Income Communities*, CMTYS. & BANKING 17, 18-19 (2010), available at [http://www.bos.frb.org/commdev/c&b/2010/summer/Solomon\\_YaleLaw\\_helps\\_communities.pdf](http://www.bos.frb.org/commdev/c&b/2010/summer/Solomon_YaleLaw_helps_communities.pdf). The mayor also sought assistance on the development of one of the nation's first municipal resident identification cards. See Kaitlin Thomas, *One Law Clinic, Two Cities*, YALE L. REP. 40, 44 (2008), available at [http://www.law.yale.edu/YLR/pdfs/v55-1/W08\\_clinic.pdf](http://www.law.yale.edu/YLR/pdfs/v55-1/W08_clinic.pdf).

32. See Golden & Fazili, *supra* note 12, at 45-47.

33. See CMTY. & ECON. DEV. CLINIC OF YALE LAW SCHOOL, REPORT TO THE MAYOR OF THE CITY OF NEW HAVEN (2007) (on file with the Community and Economic Development Clinic). Much of the analysis done was based upon data purchased from the Warren Group and information provided by RealtyTrac. See REALTYTRAC, <http://www.realtytrac.com/home> (last visited Feb. 1, 2011); WARREN GROUP, <http://www.thewarrengroup.com/portal> (last visited Feb. 1, 2011). This information continues to be tracked and updated by the ROOF Project. See generally ROOF PROJECT, <http://www.theroofproject.org> (last visited Feb. 2, 2011).

34. Memorandum from the ROOF Project, New Haven, to John DeStephano, Jr., Mayor, New Haven (Sept. 7, 2010) (on file with author).

35. ROOF Project, Funding Application 3 (May 2008) (on file with author).

36. *Id.*

37. *Id.*

mirrors the collaborative structure of the OFC process discussed below, included on-the-ground service organizations, city government, a local community development financial institution (CDFI), and the local law school clinic.<sup>38</sup> The law school students researched best practices and successful legislative initiatives, feeding that information into the process of designing local solutions. In turn, the collaborative participants, who worked on the front lines on a day to day basis, reported real time data on how servicers were responding, which servicers were being most cooperative, and which federal or state policies were and were not working. And if they were not working, why? Weekly executive committee meetings during the first two years enabled quick responses to new and changing needs.

For illustrative purposes, I briefly discuss one example of local experience with obstacles not appropriately addressed on the federal level: the lack of adequate recognition and appropriate use of counseling.<sup>39</sup>

### III. THE ROLE OF COUNSELING

From the beginning, the key role of Housing and Urban Development (HUD) certified counselors was apparent to those trying to respond to the growing need for adequate recognition and appropriate use of counseling.<sup>40</sup> Also, it was clear early on that this critical resource, HUD certified counse-

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38. A valuable resource in ROOF and other local responses has been the engagement of law school clinics. In the case of ROOF, the students provided essential research and updated information on national best practices and legislative initiatives. They analyzed complex statutes, regulations, and contracts. Other clinical programs involving students in foreclosure response initiatives include the University of Baltimore School of Law; William Mitchell College of Law; Harvard Law School; American University, Washington College of Law; and Cleveland-Marshall College of Law.

39. The obstacles to appropriate servicer responses were obvious to us from an early stage. Within just the first weeks of our regular ROOF meetings, we identified that servicers were not properly staffed, did not have systems set up to keep track of documents, and the incentives were misaligned to get servicers to act quickly and appropriately. We did everything we could on the local level. We tried working with our local banking community, but discovered that our local banks were not connected to a large number of local foreclosures. We wrote to trustees and were told that decisions were made by servicers. The servicers hid behind what they said the Pooling and Servicing Agreement (PSA) allowed. Our students researched various bases for litigation, none of which seemed fruitful. We contacted our federal representatives. We even had a visit by Secretary Donovan in April of 2009. But the government continued to depend upon "carrots," when it was obvious then, as it is now, that "sticks" were required.

40. As a reflection of how even HUD may not appreciate the importance of the HUD certified counselors in the loss mitigation process, I could not find a place on the HUD website that provided general information on HUD certified counselors. However, one of the HUD certified agencies provided a list of Frequently Asked Questions on its website. See *Frequently Asked Questions About HUD Approved Housing Counseling*, FEDERATION, <http://www.natfed.org/i4a/pages/index.cfm?pageid=1484> (last visited Jan. 18, 2011).

lors, was under-recognized by both state and federal actors. In terms of collecting accurate information from at-risk homeowners, the key ROOF partner was (and is) Neighborhood Housing Services of New Haven (NHS).<sup>41</sup> At the end of 2007, NHS had to turn its successful homeownership counseling center into a loss mitigation center. At the heart of this effort was NHS's team of HUD certified counselors. Headed by HomeOwnership Center Managing Director, Bridgette Russell, the staff worked tirelessly to meet the growing demand, but also took time to share their insights to help make New Haven's comprehensive response effective and efficient.

Counseling, when done right, makes a significant difference.<sup>42</sup> What we discovered in practice was that, as much as possible, counseling interactions should be done face to face and not over the telephone. Modifications take time, and so multiple meetings are required. Familiarity with the servicers, how they operate, who to talk to, and how to have successful interactions was key. Russell and her staff understood these factors and, therefore, established procedures that would result in more successful modifications.

These key elements of quality counseling were not made essential elements of the HOPE Hotline, the Bush Administration's first attempt to meet the growing need of help for homeowners.<sup>43</sup> When the HOPE Hotline was first announced, the ROOF project immediately geared the outreach efforts around it. It soon became apparent, however, that local homeowners were not necessarily being directed to NHS. Instead, they would be directed to any number of telephone-based counselors. Homeowners sent to these other counseling services would ultimately find their way to NHS after failing to obtain a modification. After hearing about many such experiences, we made the decision to drop the HOPE Hotline number in our outreach. Instead, we switched to using a hotline developed by the local United Way, which we knew would direct individuals to the

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41. *About NHS*, NEIGHBORHOOD HOUS. SERVS. OF NEW HAVEN, <http://www.nhsofnewhaven.org/about-nhs.html> (last visited Jan. 18, 2011).

42. During the first year of the National Foreclosure Mitigation Counseling (NFMC) Program, NFMC-counseled homeowners were "about 1.6 times as likely to get out of foreclosure, and avoid a foreclosure completion, than they would have been had they not received NFMC counseling." NEIL MAYER ET AL., URBAN INST., NATIONAL FORECLOSURE MITIGATION COUNSELING PROGRAM EVALUATION: PRELIMINARY ANALYSIS OF PROGRAM EFFECTS, at vii-viii (2009), available at [www.urban.org/uploadedpdf/411982\\_NFMC\\_program\\_evaluation.pdf](http://www.urban.org/uploadedpdf/411982_NFMC_program_evaluation.pdf).

43. For an early press release, see Press Release, Hope Now, 888-995-HOPE Hotline Receives Record Call Volume (Dec. 11, 2007), available at <http://www.fsround.org/hope-now/pdfs/Hotlinefollowuprelease.pdf>.

NHS counselors.<sup>44</sup> Once we found this problem, we tried to report it to the director of the HOPE Hotline. Although we did provide the feedback, we do not believe that it was ever used to make changes in the program design.

We had more success in educating state officials about the importance of the HUD certified counseling network. Connecticut was one of the first states to initiate legislation to create a court-sponsored foreclosure mediation program.<sup>45</sup> This program, which has become a successful model for other states, was initially designed without awareness of the existing counseling network.<sup>46</sup> The ROOF project worked to educate those developing the program, introduce them to the counseling process, and train the initial mediators in how to work productively with counselors.

The frustrations we experienced in trying to improve policy tools finally found an outlet in a unique effort to craft national solutions through local lessons learned. Although it is not yet clear how we can use the White Paper to make inroads in needed policy changes, the process itself was empowering.<sup>47</sup> Further, connections made during this process will bear fruit in improving local responses to the foreclosure crisis.

#### IV. THE OPPORTUNITY FUNDING CORPORATION'S ECONOMIC STABILIZATION WHITE PAPER SERIES: A MODEL FOR INFORMING FEDERAL POLICY?

In the late spring of 2010, the Opportunity Funding Corporation (OFC) organized a six-month dialogue series. OFC was tasked with identifying the policy responses needed to stem foreclosures and regenerate economic activity in African-American and Hispanic-American communities hardest hit by the crisis.<sup>48</sup> The OFC Economic Stabilization White Paper Series involved more than seventy experts on various aspects of the foreclosure crisis.<sup>49</sup> OFC engaged the Yale School of Management (SOM), particular-

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44. See UNITED WAY OF CONN., <http://www.infoline.org> (last visited Feb. 2, 2011).

45. An Act Concerning Responsible Lending and Economic Security, 2008, 2008 Conn. Acts 08-176 (providing responsible lending and economic security), *available at* <http://www.cga.ct.gov/2008/ACT/PA/2008PA-00176-R00HB-05577-PA.htm>.

46. See ALON COHEN & ANDREW JAKABOVICS, CTR. FOR AM. PROGRESS, NOW WE'RE TALKING: A LOOK AT CURRENT STATE-BASED FORECLOSURE MEDIATION PROGRAMS AND HOW TO BRING THEM TO SCALE 8 (2010), *available at* [http://www.americanprogress.org/issues/2010/06/pdf/foreclosure\\_mediation.pdf](http://www.americanprogress.org/issues/2010/06/pdf/foreclosure_mediation.pdf).

47. See *infra* note 49 and accompanying text.

48. See *supra* note 14 and accompanying text.

49. Participating "Thought Leaders" included Congresswoman Maxine Waters, Congressman Elijah Cummings, Congressman Gregory Meeks, as well as leaders from the Center for Responsible Lending, the National Urban League, the National Community Reinvestment Coalition, the National Council of La Raza, NeighborWorks America, HUD, Goldman Sachs, and many other organizations.

ly Professor Constance Bagley, who had worked with OFC on prior projects. In turn, Professor Bagley and Professor Stephen Hudspeth (who holds an appointment at both SOM and the Yale Law School) reached out to the Yale Law School's CED clinic because of the clinic's work in ROOF. I, together with a core group,<sup>50</sup> served an organizing role in preparing, researching, and writing the White Paper.<sup>51</sup>

After a month of initial planning and research, OFC hosted a day-long summit on Capitol Hill on July 27, 2010.<sup>52</sup> We heard from over fifty participants, including representatives of non-profit organizations doing both direct work related to the crisis and advocacy work. We had representatives from community financial institutions, academia, policy makers, members of Congress, and governmental officials. At the end of that event, the participants were divided into working groups,<sup>53</sup> and a series of follow-up conference calls were held for each working group. Additional experts were identified and invited to participate to address particular aspects of the work. Participants vetted and discussed multiple drafts of recommendations. More research was done in response to questions raised. In the end, after hours of deliberation and refinement, the White Paper draft was completed. Another level of participants then vetted it again to prepare the final draft. It was formally presented to members of Congress and the Obama Administration on November 30, 2010. Below, I elaborate on a few of the major recommendations presented in the White Paper to illustrate how this collaborative deliberation promoted effective policy recommendations.<sup>54</sup>

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50. Constance E. Bagley, Professor in the Practice of Law and Management, Yale School of Management (SOM); James Carr, CBO, National Community Reinvestment Coalition; Stephen Hudspeth, Lecturer at Yale Law School and SOM; and Sharon Pratt, Monday Raquel Webb, Joid Samuda, and Carolyn Bowden from OFC. SOM graduate John Rooney and Yale Law School student Caroline Novogrod served as rapporteurs of multiple working group meetings and the two summits, and were the co-editors of the White Paper.

51. See RECOMMENDATIONS, *supra* note 15.

52. OPPORTUNITY FUNDING CORP., ECONOMIC STABILIZATION WHITE PAPER SERIES (July 27, 2010), available at [http://www.ncnw.org/images/white\\_paper\\_strategy.pdf](http://www.ncnw.org/images/white_paper_strategy.pdf).

53. *Id.* The initial working groups were: (1) Net Worth Implications of Foreclosure and Methodologies to Mitigate the Crisis; (2) Post-Crisis Recommendations for Promoting Homeownership; (3) Post-Crisis Recommendations—Wealth Creation; and (4) Business Opportunities Emanating from the Foreclosure Crisis/Ensuring Minority Business Participation. Through the course of the deliberations, the format and structure of White Paper changed to reflect the consensus on priorities.

54. All of the recommendations are so important that I had trouble picking just a few on which to focus. I chose to emphasize the counseling system, the same focus I used in the section discussing New Haven-based work, to carry a thread through the whole essay. However, I want to mention two other areas I believe are particularly critical and should receive attention: (1) the recommendations to promote principal reductions; and (2) the recommendations to find innovative ways to engage servicers, so that properties are “right-



## V. SUPPORTING AND EXPANDING THE COUNSELING PROCESS

One of the key observations of the White Paper, which was echoed over and over by those working most directly with at-risk homeowners, was recognizing what works and supporting those efforts.<sup>55</sup> As reflected in one of the White Paper's key recommendations,<sup>56</sup> the essential role of HUD certified counselors<sup>57</sup> should be recognized and adequately supported. It is essential to identify first what successful loss mitigation counseling looks like (i.e., face-to-face, in-depth, and with follow-through). Not surprisingly, and as discussed in the section on ROOF above, our experience in New Haven strongly supported this area of recommendations. Not all processes that fall under the broad category of loss mitigation counseling provide successful outcomes for homeowners. Successful counseling is time-intensive and expensive, so appropriate resources must be dedicated (or other funding mechanisms—such as contributions by the private sector—developed).

More can also be done to ensure that at risk homeowners access existing services. In its May 2010 report to Congress, NeighborWorks America, which manages the National Foreclosure Mitigation Counseling (NFMC) program, indicated that more than one in five homeowners reaching out to NFMC-funded counseling agencies were already over one hundred twenty days delinquent.<sup>58</sup> The National Community Reinvestment Coalition

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sized" financially and eligible homeowners are kept in place, avoiding more vacancies and destabilization of neighborhoods.

55. Among the thought leaders who contributed to discussions around the role of housing counselors were Lautaro Diaz, Vice-President, Housing and Community Development of National Council of La Raza; Graciela Aponte, Legislative Analyst, National Council of La Raza; Larry Gilmore, President & CEO, HOPE LoanPort; Marcia Griffin, President, HomeFree-USA; Marietta Rodriguez, National Director of Home Ownership Programs NeighborWorks America; and Peter Tatian, Senior Research Associate, the Urban Institute.

56. The fourth recommendation of the White Paper states: "INCREASE the reach of housing counselors to help distressed homeowners to avoid foreclosure when possible. Going forward, implement counseling programs to promote financial literacy for prospective homebuyers and to ensure that they will not fall victim to unscrupulous lending practices." See RECOMMENDATIONS, *supra* note 15, at 3.

57. As has been noted by many advocates, there are many times when counseling is insufficient and legal assistance is needed. In New Haven we are just beginning to work on how to meet this need, either by expanding assistance to the foreclosure defendant's bar or by working with the court system on supporting pro se litigants. Because the legal landscape for foreclosures is state-specific, the federal government can only provide general support such as funding for legal assistance. There were and are, however, significant ways that the federal government could be supporting the efforts of HUD-certified counselors in navigating the modification process with servicers and partnering with local legal resources.

58. NEIGHBORWORKS AM., NATIONAL FORECLOSURE MITIGATION COUNSELING PROGRAM CONGRESSIONAL UPDATE: ACTIVITY THROUGH JANUARY 31, 2010, at 46 (2010), *avail-*

(NCRC) found that homeowners who are severely delinquent or already in foreclosure are significantly less likely to receive Home Affordable Modification Program (HAMP) modifications.<sup>59</sup> Still others fall victim to fraudulent “rescue” scams. Innovative multimedia campaigns and education programs, as called for in the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), could raise homeowner awareness of local programs, help persuade homeowners that seeking unbiased counseling is worthwhile, and alert homeowners to scams. Local partnerships between nonprofits and television networks would help housing counselors reach key demographics efficiently. Multi-lingual public service announcements, advertisements in local newspapers, and inserts in servicers’ mail to homeowners will increase the probability that homeowners turn to their local counseling centers when first facing default.

Another important way of expanding on what works is to strengthen the tools that already exist for homeowners and the counselors (and attorneys) that are helping them.<sup>60</sup> Even in places like New Haven, where homeowners had access to the best quality HUD certified counseling through Neighborhood Housing Services of New Haven, the federal government could have and should have provided additional tools to counselors by strengthening oversight of its own policies and programs. All White Paper participants agreed that HAMP has had limited success. Even the government’s own accounting office found that the program relies too much on guidelines and not enough on compliance oversight.<sup>61</sup> Setting guidelines for servicers without providing recourse for homeowners does not work.

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able at <http://www.nw.org/network/nfmcpc/documents/CongressionalReportandAppendices.pdf>.

59. NAT’L CMTY. REINVESTMENT COAL., HAMP MORTGAGE MODIFICATION SURVEY 2010, at 3 (2010), available at [http://www.ncrc.org/images/stories/mediaCenter\\_reports/hamp\\_report\\_2010.pdf](http://www.ncrc.org/images/stories/mediaCenter_reports/hamp_report_2010.pdf). NCRC’s 2010 survey of almost two hundred distressed homeowners found that

50 percent of those who had a foreclosure pending and 70 percent of those who had a foreclosure judgment received no modification on their loan, compared to 25 percent of respondents who were current on their mortgage. Also, 43.7 percent of the respondents that were delinquent on their mortgage payment received no modification.

*Id.* at 10.

60. The third recommendation of the White Paper states: “STRENGTHEN oversight of servicers participating in the Home Affordable Modification Program (HAMP) and other government foreclosure mitigation programs by creating an independent office to oversee compliance and by giving rejected homeowners access to an appeals process.” See RECOMMENDATIONS, *supra* note 15, at 3.

61. In its June 2010 report, the U.S. Government Accountability Office detailed several shortcomings in U.S. Department of the Treasury’s oversight of servicers and servicers’ treatment of borrowers. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 8.

The White Paper strongly urges the expedited implementation of relevant provisions of Dodd-Frank.

An important way to support homeowners and their advocates would be to create the Office of the Homeowner Advocate (OHA) to help resolve problems with servicers. This recommendation received strong support from the White Paper deliberators. Having a dedicated advocacy office within the government would go a long way toward ensuring that the recurring problems encountered with servicers can be quickly identified and addressed. This would institutionalize the kind of feedback loop that this essay recommends. HAMP loan modification denials would be appealable to OHA. Based on feedback from homeowners, housing counselors, and housing lawyers, OHA could work to identify systematic issues obstructing modifications and to alert relevant agencies. Most importantly, this office would provide homeowners with access to a formal appeals process. Recent changes in HAMP require servicers to provide homeowners with more information on the basis for their rejection, but homeowners remain powerless to challenge a denial—even if the denial is made in error.

I have just touched on one area explored in the White Paper. I hope that this small sample both encourages the reader to spend time reading the entire White Paper and draws attention to why I believe this process holds promise for informing policy on the federal level.

### CONCLUSION

By early 2008, local actors responding to the foreclosure crisis had already encountered many of the major obstacles that are now known by the average consumer from news about this continuing crisis. These insights, voiced to Congress and the federal government in a variety of ways, did not affect significant or timely changes to federal policy. There was, and continues to be, a disconnect between local experience and national policy-making.

It is a challenge to develop a dependable, robust feedback loop to federal policymakers. This essay suggests both that local experience is critical to timely and effective adjustments to policy and that collaborative, deliberative processes that build from local experience are possible. The OFC Economic Stabilization White Paper<sup>62</sup> provides a comprehensive roadmap for action, identifying both successful aspects of existing policies and additional new policies. The author suggests that examining local lessons through this kind of collaborative deliberation contributes to higher quality

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62. See RECOMMENDATIONS, *supra* note 15, at 3.

proposals.<sup>63</sup> Engaging a wide variety of actors, some of whom come with direct and relevant experiences of implementing policies and others with a sophisticated analysis of the problem, can produce a whole that is greater than the sum of its parts. In the case of the OFC White Paper, there was a high level of consensus achieved across participants.<sup>64</sup> To improve the efficacy of federal policies, governmental actors should find ways to proactively employ such collaborative processes. Particularly in the case of an urgent problem like the foreclosure crisis, government must find reliable ways to assess and quickly adjust policies. A collaborative deliberation that engages lessons learned from actual implementation could provide just the kind of process that is needed.

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63. *Id.* at 9-10. I have also seen the emergence of this same kind of informed, collaborative deliberation around developing strategies to reform the 2012 Farm Bill. After attending a recent two day summit on the topic, I am convinced that current efforts to reform the farm bill will be enhanced by the information sharing and consensus building that is occurring as a result of these collaborative efforts, despite the fact that no one expects any increase in funding. See NAT'L SUSTAINABLE AGRIC. COAL., THE ROAD TO REFORM: 2012 FARM BILL SUMMIT (2010), available at <http://sustainableagriculture.net/our-work/meetings/farm-bill-summit/>; see also NAT'L POL'Y & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY, FARM BILL 2010: BUILDING COALITIONS FOR CHANGE (2010), available at <http://www.nplanonline.org/sites/phlpnet.org/files/YaleFarmBill2012FINALWEB.pdf> (arguing that the Obama administration should engage directly with groups like this to benefit from the experience-based analysis).

64. Many participants reflected on being surprised at both how comprehensive the recommendations were and how well they covered the issues.