

ICE DETENTION THROUGH U.S. MARSHALS AGREEMENTS

ELLYN JAMESON*

TABLE OF CONTENTS

I.	INTRODUCTION	280
II.	THE CONTRACTS ON PAPER	283
	A. <i>Methodology and Data</i>	284
	B. <i>Key Takeaways</i>	286
III.	THE CONTRACTS IN PRACTICE	288
	A. <i>The Evolving Authority and Legal Structure for ICE Use of IGAs</i>	289
	B. <i>The Negotiation Process</i>	295
	1. A Historical Preoccupation with Price	295
	2. Negotiation by Algorithm: The eIGA	298
	3. Disorganized Bureaucracy	299
	C. <i>The Day-to-Day Detention Process</i>	300
	1. Inspections and Oversight	301
	2. Basic Ordering Agreements and Legal Ambiguity	303
IV.	NOT JUST CONTRACTS: THE ROLE OF LOCAL DEMOCRACY	308
	A. <i>Community Organizing Against ICE Detention</i>	309

* Ellyn Jameson, J.D. 2020, University of Pennsylvania Carey Law School, MS Social Policy 2020, University of Pennsylvania School of Social Policy and Practice. I am tremendously thankful to many individuals who helped make this Note possible by providing feedback, resources, and encouragement at different stages of my research: Abel Rodriguez, Bridget Fahey, Beatrix Lu, Mark Fleming, Vanessa Stine, and Heidi Altman. I owe an especially large debt of gratitude to Sara Rendell for her invaluable insight and endless enthusiasm over the course of this project. I greatly appreciate the excellent work of the editors of the Georgetown Immigration Law Journal on this Note, and as always none of this would not have been possible without the support of my husband and family. All errors are my own. © 2021, Ellyn Jameson.

B. <i>The Power and Impact of Local Transparency</i>	312
V. CONCLUSION	314

I. INTRODUCTION

The size and scope of immigration detention has been rapidly expanding over the past few decades, largely fueled by the ever-increasing criminalization of migration.¹ In the 2019 fiscal year, Immigration and Customs Enforcement (ICE) detained as many as 50,000 people per day in over 200 facilities across the country.² Considered a civil penalty rather than a punishment, immigration detention does not come with the protections of criminal punishment like guaranteed legal defense³ or a hearing before an Article III judge.⁴ Yet civil immigration detention, which takes place in local jails and private prisons across the country, looks much like criminal incarceration.⁵ Much criticism has been rightfully leveled at ICE for its abysmal standards of care and inhumane, profit-driven behaviors.⁶ A related body of literature also considers how the legal framework underlying this vast scale of detention perpetuates those inhumane conditions.⁷ This Note contributes to that

1. See Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 98, 101-02 (2019) (discussing a more than fivefold increase in immigration detention between 1994 and 2017 and the multiple causes for that expansion); AMADA ARMENTA, PROTECT, SERVE, AND DEPORT: THE RISE OF POLICING AS IMMIGRATION ENFORCEMENT 5-6 (2017) (describing the characterization of unauthorized immigrants as criminal and the “decidedly punitive turn” of national immigration enforcement).

2. U.S. IMMIGRATION AND CUSTOMS ENF’T, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 5-6 (2019), available at <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>; see also *Immigration and Customs Enforcement Detention*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (TRAC) IMMIGR., SYRACUSE UNIV. (set interactive tool to “April 2019”), <https://trac.syr.edu/phptools/immigration/detention/> (last accessed Oct. 31, 2020) [hereinafter “TRAC Detention Data”].

3. Careen Shannon, *Immigration is Different: Why Congress Should Guarantee Access to Counsel in All Immigration Matters*, 17 UDC-DCSL L. REV. 165, 166 (2014).

4. Immigration judges are in fact Department of Justice attorneys without even the protections of other administrative law judges, and the level of political pressure on immigration judges to carry out the administration’s aggressive deportation goals has been harshly criticized. SOUTHERN POVERTY LAW CENTER, THE ATTORNEY GENERAL’S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 7 (2019), https://www.splcenter.org/sites/default/files/com_policyreport_the_attorney_generals_judges_final.pdf.

5. Cesar Cuauhtemoc Garcia Hernandez, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 256-57 (2017); see generally Renee Lima Marin & Danielle C. Jefferies, *It’s Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Detention Theoretically Possible?*, 96 DENV. L. REV. 955, 963-965 (2019) (providing a firsthand account of life in an immigration detention center and challenging the legal fiction that confinement can ever be civil).

6. See, e.g., Peter Markowitz, *Abolish ICE . . . and Then What?*, YALE L. J. FORUM 130, 135 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3420771&download=yes (collecting sources for the proposition that “ICE has amassed a well-earned reputation as a dishonest, racist, and rogue agency that regularly flouts legal limits”); HEIDI ALTMAN & MARY SMALL, PRIVATE PROFIT, DETENTION WATCH NETWORK & NATIONAL IMMIGRANT JUSTICE CTR., ICE LIES: PUBLIC DECEPTION 2-4 (2018), https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-02/IceLies_DWN_NIJC_Feb2018.pdf.

7. See, e.g., Garcia Hernandez, *supra* note 5, at 246 (“[T]he practice of immigration imprisonment, as designed and operated, has stripped migrants of their inherent dignity as humans and has instead commodified them into a source of revenue.”); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 377 (2006) (describing how “membership theory . . . is at work in the convergence of criminal and immigration law”); Robert Knowles & Geoffrey Heeren,

conversation by focusing on a narrow piece of the legal framework: ICE's use of preexisting intergovernmental agreements between local jails and the U.S. Marshals Service (USMS) to house immigrant detainees.

ICE owns only a handful of detention centers itself; rather, most ICE detention takes place in local jails and private prisons through a web of contracts with cities, counties, states, other federal agencies, and private contractors. This “convoluted and obscure” contracting process has resulted in a system characterized by an astonishing lack of transparency and uniformity.⁸ Broadly speaking, there are four main types of ICE detention centers. Service Processing Centers are the facilities that are owned by ICE, although they often rely on private contractors for operation.⁹ There are currently only five of these centers,¹⁰ and they house just over seven percent of ICE's total average daily population (ADP).¹¹ The second type of detention centers are Contract Detention Facilities (CDFs), which are private prisons that contract directly with ICE.¹² There are currently only nine in operation across the country, but they house hundreds of detainees each.¹³ The third form of detention, which accounts for the largest proportion of ICE detainees, occurs through Intergovernmental Service Agreements (IGSAs), through which ICE contracts with state and local governments—usually a county sheriff or a city jail—for bedspace at a predetermined per diem rate. Local governments, therefore, have strong incentives to both increase the number of ICE detainees and to cut costs on their care.¹⁴ Most of these facilities house ICE detainees alongside their own criminal inmates, although a smaller number, known as Dedicated IGSAs (DIGSAs), house only ICE detainees.¹⁵ In the first part of the 2020 fiscal year, two-thirds¹⁶ of ICE's ADP was housed in IGSAs,

Zealous Administration: The Deportation Bureaucracy, *RUTGERS L. REV.* (forthcoming 2020) (discussing how the current extreme positions displayed by ICE are a product of a “bureaucratic culture of immigration enforcement”); Sara Rendell, Student in Anthropology, University of Pa., Contagious Containment: Mapping Health Concerns from ICE Detention Practices, Presentation at University of Pa. (Mar. 23, 2020) (connecting the policies and systems in immigration detention centers to a systemic failure to provide adequate healthcare).

8. CLAUDIA VALENZUELA & TARA TIDWELL CULLEN, NAT'L IMMIGRANT JUST. CTR. (NIJC), FREEDOM OF INFORMATION LITIGATION REVEALS SYSTEMIC LACK OF ACCOUNTABILITY IN IMMIGRATION DETENTION CONTRACTING 6 (Aug. 13, 2015), available at <https://immigrantjustice.org/sites/default/files/content-type/research-item/documents/2017-03/NIJC%20Transparency%20and%20Human%20Rights%20Project%20August%202015%20Report%20FINAL3.pdf>.

9. *Id.* at 5.

10. *ICE Detention Data*, IMMIGR. AND CUSTOMS ENF'T, <https://www.ice.gov/doclib/facilityInspections/dedicatedNonDedicatedFacilityList.xlsx>, (Feb. 3, 2020) [hereinafter *ICE Data Feb. 2020*].

11. In February 2020, SPCs accounted for 2,400, or 10.38%, of FY2020's current ADP of 23,421. *Id.*

12. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 5.

13. Of ICE's ADP for fiscal year 2020 of 23,421; in February 2020, 5,879 individuals (25%) were housed in ten CDFs. *ICE Data Feb. 2020*, *supra* note 10. This does not include “USMS CDFs,” which will be discussed later.

14. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 5-6.

15. *Id.*

16. The average daily population in February 2020 in either an IGSA, DIGSA, or dedicated family detention center was 14,785, or 63.1% of the FY 2020 ADP. *ICE Data Feb. 2020*, *supra* note 10.

DIGSAs, or Family Detention Centers (which are also owned by counties).¹⁷

The final category of ICE detention, and the focus of this Note, is state and local jails that have Intergovernmental Agreements (IGAs) not with ICE, but with the USMS, which are then utilized by ICE. The USMS does not maintain any prison space of its own,¹⁸ yet on any given day, it holds tens of thousands of detainees in its custody across the country.¹⁹ It achieves this scope of detention in much the same way that ICE does: by contract, primarily with state and local jails through IGAs.²⁰ In total, there are approximately 1,200 USMS IGAs across the country.²¹ These longstanding agreements, which usually have no expiration and often predate even the existence of ICE, frequently include ICE as an “authorized agency user” for the contracted bed space.²² ICE has custody over its own detainees, but pays for their detention at the per diem rate specified by the USMS contract. Similarly, the USMS is sometimes authorized on IGAs between ICE and the local governments.²³ USMS agreements accounted for about 13% of ICE’s ADP in the first part of the 2020 fiscal year.²⁴ There are 82 USMS IGAs listed by ICE in its most recent data,²⁵ but ICE is authorized as a user on countless more. Even where ICE is not authorized, it can quickly be added to an existing USMS IGA by modification. This structure means that ICE can quickly and easily vary where it houses detainees without having to negotiate its own intergovernmental agreement.

This Note provides an overview of ICE’s use of USMS agreements, and the legal and policy questions that they raise. Although USMS IGAs are

17. TRAC Detention Data, *supra* note 2 (set interactive tool to “Family” under “Facility Type (Detailed)” to filter for facility ownership). This number does *not* include the facilities listed as capable of housing juveniles, which accounted for only five detainees on average per day during FY 2020, and whose ownership is listed as “not defined” according to publicly available data.

18. US MARSHALS SERV., FACTS AND FIGURES 2020 2 (2020), <https://www.usmarshals.gov/duties/factsheets/facts.pdf>.

19. The ADP for the USMS in FY 2019 was 61,489. *Id.*

20. The USMS also contracts with the Federal Bureau of Prisons (BOP) and private prison companies, but the majority of its ADP (41,511, or 68%) was comprised of detainees housed in state and local facilities. *Id.*

21. The fiscal year 2019 and 2020 fact sheets for the USMS list the number as “approx. 1,100” and “approx. 1,200,” respectively. *See id.*; US MARSHALS SERV., FACTS AND FIGURES 2019 2 (2019), <https://www.motherjones.com/wp-content/uploads/2019/09/GeneralSourceForAllNumbers.MarshalsDoc.pdf>.

22. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 6; *see, e.g., IGA 45-07-0041 between USMS and Lafayette County Jail, LA*, US MARSHALS SERV. (Oct. 1, 2013), available at https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/missouri/lafayette_county_jail.pdf (including ICE as an “authorized agency user”).

23. *See, e.g., Modification 003 to IGA ACB-7-I-0078 between DHS and the Seneca County Sheriff’s Office*, INSM U.S. IMMIGR. & CUSTOMS ENF’T (Oct. 17, 2003), <https://www.ice.gov/doclib/foia/isa/senecacountyjailtiffinohasofmodification5.pdf> (“The [USMS] is included as a participant in this intergovernmental service agreement.”) (last accessed Mar. 17, 2021).

24. The ICE ADP in USMS IGAs and USMS CDFs was 5,512 out of a total ADP of 42,754. *ICE Data Feb. 2020*, *supra* note 10.

25. *Id.*

frequently grouped with directly contracted IGSA^s,²⁶ this method of detention raises unique questions that come into focus when addressed individually. I begin in Part II by examining some key trends and features of the documents themselves. In Part III, I discuss how ICE's use of USMS agreements functions in practice from both the federal and local perspectives. ICE, the USMS, and local governments have distinct and sometimes conflicting incentives that shape their understandings of the agreements as merely contracts for services. This understanding of IGAs as contracts is reinforced by the language and processes for negotiating and implementing the agreements, which are largely drawn from the context of federal procurement. As a result, what should be a deliberate and conscious act of policymaking, subject to multiple layers of transparency, is instead turned into an opaque and intricate business transaction that takes place largely out of public view.

Despite their problematic framing as procurement rather than policy, these IGAs are *not* just contracts; they are a central piece of a nationwide policy of immigration detention that would not be possible without state and local cooperation.²⁷ Therefore, in Part IV, I discuss how that insight could inform advocacy efforts. Requiring greater transparency and local democratic participation for any kind of detention agreement counteracts the procurement framing of detention, and creates political costs for local governments that may make cooperation with ICE less attractive. This is particularly relevant for ICE detention using USMS contracts, which reduce the political costs for local governments that might otherwise accompany a directly negotiated IGSA. By providing an in-depth description of ICE detention through USMS contracts, this Note aims to provide another tool for advocates working to dismantle the detention system.

II. THE CONTRACTS ON PAPER

According to ICE's most recent data, it was actively utilizing 82 USMS agreements across the country to house an ADP of 5,512 people in the first part of the 2020 fiscal year, from October 2019 to February 2020.²⁸ But because that is the *average* daily population, it understates the scope of detention under USMS contracts, through which many facilities house only a few detainees and often infrequently. For example, the ADP for Erie, Pennsylvania appears as 0 for the first five months of the 2020 fiscal year in

26. For example, the FOIA library on ICE's website provides links to many of its IGSA^s—several of which are actually USMS agreements. See also *Regarding Oversight of Detention Facilities, Hearing on ICE oversight before the Subcomm. on Oversight, Mgmt., & Accountability of the H. Comm. on Homeland Security*, 116th Cong. 1-9 (2019) (Statement of Tae Johnson, Assistant Dir. for Custody Mgmt., Enf't and Removal Operations).

27. Anders Newbury, *Illegal Immigration Arrests: A Vermont Perspective on State Law and Immigration Detainers Supported by Intergovernmental Agreements*, 44 VT. L. REV. 645, 650-51 (2020) (describing how the Trump administration's aggressive deportation rhetoric "has been somewhat stymied by a reliance on LLEAs that are increasingly reticent to participate in federal deportation efforts"); cf. Bridget Fahey, *Federalism by Contract*, 129 YALE L. J. (forthcoming 2020) (arguing that intergovernmental contracts should be considered a form of public law).

28. *ICE Data Feb. 2020*, *supra* note 10.

ICE's data,²⁹ but public records provided by the county show that at least 13 ICE detainees were housed in Erie under its USMS agreement during that time period. Each of these detainees was only there between one and five days.³⁰ The eighty-two facilities listed do not include numerous facilities where ICE has housed detainees under USMS in recent years, and represent only a fraction of facilities where it is potentially authorized to do so.

To gain a more complete picture of these USMS agreements and how ICE uses them, I examined key elements of over 400 USMS agreements that are publicly available through the USMS website, ICE's website, the National Immigrant Justice Center's FOIA database of ICE detention contracts. Several overlapped; a significant number did not. Sometimes, these sources provided different versions of the same contract. I then compared that list with data from the Transactional Records Access Clearinghouse on the number of detainees housed pursuant to USMS agreements at discrete points in time in recent years. This dataset was based on a convenience sample of agreements and data that were publicly available and therefore is not meant to be an authoritative picture of ICE detention through USMS contracts. It does, however, highlight some key trends.

A. *Methodology and Data*

In total, I compiled a list of 425 facilities where either the USMS IGA was publicly available or data indicated that ICE was using a USMS agreement. Of those, ICE was an authorized user on 244, usually on the original contract.³¹ For some agreements, ICE was added by a "modification": a one-page addendum stating that ICE was being added as an authorized agency user and providing its billing information. The local government was required to sign some of those modifications,³² but others merely marked a box stating that the local government was "not required to sign this document."³³ Many of the facilities where ICE data showed actual use of a USMS agreement were not among the publicly available contracts. For 13 facilities, data indicated that ICE housed detainees under USMS agreements, but the USMS contracts that were available did not actually authorize ICE.³⁴ Some of these discrepancies may be due to incomplete records, but at least one was a subject of my public records request and I was assured by the county that there was no modification in its records.³⁵

29. Specifically, from the months of October 2019-February 2020.

30. Right-to-Know Request Response from Erie Cty. to author (Mar. 20, 2020) (on file with author).

31. Of 242 contracts where I had both the original date and an authorization for ICE to use the contract, only 30 were added by modification.

32. See, e.g., Modification 1 of IGA 11-09-0034 between Contra Costa Cty. and USMS (Mar. 31, 2010) (on file with author).

33. See, e.g., Modification 1 of IGA 60-97-0010 between Geauga Cty. Sheriff's Office and USMS (Aug. 8, 2011) (on file with author).

34. Those were La Paz, Ariz.; Rock Island, Ill.; Grayson, Ky.; Washoe, Nev.; Clinton, N.Y.; Livingston, N.Y.; Rensselaer, N.Y.; Geauga, Ohio; Okmulgee, Okla.; Erie, Pa.; Norfolk, Va.; Roanoke City, Va.; and the Virginia Peninsula Regional Jail.

35. Email from Richard Perhacs, Erie Cty. Open Records Officer, to author (Apr. 20, 2020) (on file with author).

The very fact that so many agreements were missing or varied between sources is illustrative, as this shows how difficult it can be to access them. While these agreements are undeniably public records, the fact that multiple agencies are signatories sometimes results in a game of finger-pointing over who is responsible for producing them. In the National Immigrant Justice Center’s FOIA litigation to obtain all of ICE’s detention contracts, it took a court order for ICE to begin producing the USMS contracts that it used, because ICE claimed it did not have control over those agreements.³⁶ In one of my state public records requests, a county also initially asserted that I was required to request records related to its USMS IGA through FOIA instead of through the county.³⁷ Although the county eventually produced the documents, the process was delayed because “the federal agencies believe the documents are theirs,” and wanted to review and redact them before release.³⁸

Table 1: Snapshots of ICE Detention Utilizing USMS IGAs³⁹

425 Facilities Listed	Sept '15	Sept '16	Sept '17	Nov '18	July '19	FY2020
TOTAL in USMS:	4255	7582	7002	8605	9465	5512
Total ICE Pop.:	31411	38810	37440	46274	55654	42797
Percentage:	13.55%	19.54%	18.70%	18.60%	17.01%	12.88%
Number USMS Facilities Utilized:	47	59	74	71	71	85

As a percentage of the total ICE detention population, the number of detainees housed under USMS agreements has remained relatively steady in recent years.⁴⁰ Although the percentage of individuals in ICE detention housed under a USMS IGA appears to decline in the 2020 fiscal year,⁴¹ as

36. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 6.

37. Email chain between Susan Weiland, Assistant Prosecuting Att’y, Geauga Cty, Ohio, and author (May 11-12, 2020) (on file with author). To its credit, the county quickly conceded that there is no legal requirement to use FOIA instead of Ohio’s Sunshine Laws, and worked with the federal agencies to provide the requested documents under state law. *Id.*

38. *Id.*

39. This chart was compiled using ICE Detention Data, *supra* note 10, and TRAC Detention Data, *supra* note 2. See *supra* notes 31-35 and accompanying text (describing methodology).

40. See *supra* Table 1.

41. *Id.*

mentioned above, this is in part because the ICE statistics from that year show average daily population⁴² while prior years show total population at a given moment. These totals also mask substantial variation in facility usage. For instance, only 55 of the facilities that housed detainees in September 2017 were doing so again just a year later, in November 2018, even though the total number of facilities was approximately the same. Even when a facility was consistently in use over the course of these data snapshots, the level of use often fluctuated significantly. For example, the East Hidalgo Detention Center housed 12 detainees for ICE in September 2015, around 100 per month in each snapshot from 2016-2018, and only three in the February 2020 data.⁴³

Also included in the data are three private prisons whose CDF contracts with the USMS are primarily utilized by ICE. These contracts all had expiration dates and were significantly more detailed, which is unsurprising given that CDFs have to comply with the requirements of the Federal Acquisition Guidelines,⁴⁴ which do not apply to intergovernmental agreements. One such facility is Otay Mesa, a CoreCivic facility in California that often holds over 1,000 ICE detainees at a time.⁴⁵ That contract was negotiated by the Office of the Federal Detention Trustee (OFDT), and ICE's individual rates appear separately in the contract.⁴⁶ In contrast, in the USMS contract for the Robert Deyton Detention Facility in Georgia, ICE is *not* directly authorized, but the contract contains a provision allowing the USMS and the OFDT to subcontract with ICE or the BOP to utilize the contract.⁴⁷ Another similar USMS contract with CoreCivic that is not currently utilized by ICE specifies that “[w]ith 14 days notice, the USMS may require ICE or the BOP to relocate their detainees to other facilities.”⁴⁸

B. *Key Takeaways*

Reading the USMS IGAs as a group revealed key similarities. In fact, many were nearly identical, with most of the variation in the language

42. See *supra* notes 28-30 and accompanying text (explaining how the use of ADP rather than total population results in a lower number).

43. TRAC Detention Data, *supra* note 2 (set interactive tool to each of the relevant months and filter for East Hidalgo Detention Center).

44. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 5.

45. See, e.g., TRAC Detention Data, *supra* note 2 (set interactive tool to ‘California’ and ‘July 2019’).

46. *Detention Contract ODT-5-C-0003 between Corrections Corporation of America and OFDT*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/tennessee/otay-mesa-contract.pdf (last accessed Nov. 1, 2020).

47. *Detention Contract ODT-8-C-0005 between the OFDT and GEO Group*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/georgia/robert-deyton-detention-facility.pdf (last accessed Nov. 1, 2020). The third facility classified by ICE as a “USMS CDF,” Rio Grande Detention Center in Texas, did not have a publicly available contract. *ICE Data Feb. 2020*, *supra* note 10.

48. *Detention Contract ODT-7-C-0002 between OFDT and Corrections Corporation of America*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/kansas/leavenworth-contract.pdf (last accessed Nov. 1, 2020).

tracking the time period when the contract was signed, rather than reflecting any individualized negotiation. They all began with a cover page that contains most of the key information, including the agreement number, effective date, and contracting officials. That first page also contained a series of boxes for “type of prisoner,” often subdivided into “sentenced” and “unsentenced,” with categories such as males, females, juveniles, or aliens. The first page almost always included a box for “authorized agency users,” which could be checked to include the BOP and ICE or ICE’s predecessor, the Immigration and Naturalization Service (INS).

Almost every contract signed with a local government contained boilerplate language making the agreement indefinite, which read:

This Agreement shall be in effect indefinitely until terminated in writing by either party. Should conditions of an unusual nature occur making it impractical or undesirable to continue to house prisoners, the Local Government may suspend or restrict the use of the facility by giving written notice to the U.S. Marshal. Such notice will be provided [number of days] in advance of the effective date of formal termination and at least [number of days] in advance of a suspension or restriction of use unless an emergency situation requires the immediate relocation of prisoners.⁴⁹

The amount of notice required to terminate the agreement varied, and many agreements included provisions setting a minimum time period, following the completion of a cooperative agreement program for jail construction, after which the contract became indefinite.⁵⁰ Still others contained such form language in the main contract, but then inexplicably had a modification making the contract indefinite.⁵¹ Only one USMS contract with a local government included a clear end date—by crossing out and annotating the regular form language.⁵²

49. See, e.g., *IGA 68-93-0020 between USMS and Westmoreland County, PA*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/pennsylvania/westmorland_county_jail.pdf (last accessed Nov. 1, 2020).

50. See, e.g., *IGA J-C28-M-061 between USMS and Marion County Jail, IN*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/indiana/marion_county_jail.pdf (last accessed Nov. 1, 2020) (stating that the agreement will be in effect for 15 years from the completion of the CAP, and indefinite thereafter); *IGA 45-00-0155 between USMS and Greene County Jail, MO*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/missouri/greene_county_jail.pdf (last accessed Nov. 1, 2020) (stating that the agreement remains in effect 10 years from the completion of the CAP, and thereafter indefinitely).

51. See, e.g., *Modification 1 of IGA 44-02-0115 between St. Louis City, MO and USMS*, U.S. MARSHALS SERV. (Aug. 23, 2006), https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/missouri/city_of_st_louis.pdf (last accessed Nov. 1, 2020). (changing the IGA term to an “indefinite period” although the original contract already contained the indefinite form language); *Modification 2 of IGA 78-02-0086 between Bowie County, TX and USMS*, U.S. MARSHALS SERV. (Oct. 6, 2006), https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/texas/bowie_county.pdf (last accessed Nov. 1, 2020). Many of these “indefinite” modifications occurred in 2006, so there is a possibility it is related to the creation of the eIGA process. See *infra* notes 115-123 and accompanying text (describing how OFDT created a new platform for applying and negotiating per diem rates known as the eIGA).

52. *IGA J-A54-M-960 between USMS and Westchester County Dep’t of Corrections*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/new_york/westchester_cty_doc.pdf (last accessed Nov. 1, 2020).

Other common form language includes a requirement that the local facility “allow periodic inspections of the facility,” usually without specifying which authorities would conduct those inspections, and some indicated that standards may differ among authorized agency users. Most of the recent inspections conducted by ICE of USMS facilities utilized the National Detention Standards.⁵³ The 2000 National Detention Standards (NDS) are more lenient than the 2008 or 2011 Performance-Based National Detention Standards (PBNDS), and many contracts do not explicitly say which standards govern.⁵⁴ Many agreements also contained form language under the heading “Receiving and Discharge of Federal Detainees,” specifying procedures for booking. Specifically, the agreements provided that the local government will “accept Federal detainees only upon presentation by a law enforcement officer of the Federal Government or a USMS designee with proper agency credentials,” and will release detainees only to the same agency that committed them.⁵⁵

Several IGAs, even some where ICE is not authorized on the cover page, contain form language describing the population of “federal detainees” as “individuals charged with federal offenses and detained while awaiting trial, individuals who have been sentenced and are awaiting designation and transport to a BOP facility, and individuals who are awaiting a hearing on their immigration status or deportation.”⁵⁶ This language is remarkable in that it groups together, for all practical purposes, three categories of detainees that the laws and courts insist are separate: convicted federal inmates, pretrial detainees, and civil immigration detainees.

III. THE CONTRACTS IN PRACTICE

The different actors involved in these detention agreements do not always view them through the same lens, but they share the common framing of detention as business. ICE and the USMS have historically been in competition for bedspace in local jails, and this competition has reinforced the problematic framing of detention contracts as a market-based procurement service as well as pushed both agencies toward more lax oversight. From the

53. See *ICE Data, Feb. 2020*, *supra* note 10. Despite both ICE and Congress’s stated goal of bringing more facilities under the stricter PBNDS standards, the percentage of ICE’s population held under the PBNDS is likely to decrease. Kathy Murdza, *ICE Revises Its Standards for Some Detention Facilities*, IMMIGR. IMPACT (Dec. 2, 2019) <https://immigrationimpact.com/2019/12/02/ice-updates-detention-standards/>.

54. VALENZUELA & TIDWELL CULLEN, *supra* note 8, at 6.

55. See, e.g., *IGA J-A67—M-098 between USMS and Lackawanna County, PA*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/pennsylvania/lackawanna%20cty_prison.pdf (last accessed Nov. 1, 2020); *IGA 11-09-0034 between USMS and Contra Costa County, CA*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/california/contra_costa_county.pdf (last accessed Nov. 1, 2020).

56. See, e.g., *IGA 04-990128 between USMS and Monroe County Sheriff’s Office, FL*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/florida/monroe_county_sheriff.pdf (last accessed Nov. 1, 2020) (including that definition but not authorizing ICE in the original document).

local perspective, jails view detention as an important source of income but distance themselves from detention as a policy, treating it as a force beyond their control. The technocratic process for determining the per-diem rate, combined with the highly informal communication process between ICE and local governments, also reinforces the perception of detention as a business transaction. In some cases, this framing even leads local governments and ICE to disregard the requirements of the contracts themselves, giving rise to potential liability.

A. *The Evolving Authority and Legal Structure for ICE Use of IGAs*

The USMS is the oldest federal law enforcement agency in the country, whose first officials were appointed by George Washington; the organization has a long history of functions including courthouse security, fugitive apprehension, and asset forfeiture.⁵⁷ In recent decades, federal pretrial detention has become one of the main functions of the USMS, particularly following the explosion in federal pretrial detainees resulting from the Bail Reform Act and the War on Drugs.⁵⁸ Because the USMS does not have any prisons of its own, it has accumulated its bedspace through a network of contracts with private prisons and local jails.⁵⁹ In the same time period, the increasingly punitive nature of immigration enforcement and the rise of mandatory detention led to a parallel rise in the immigration detention population for ICE's predecessor, the INS. Congress passed increasingly harsh immigration laws and increased the use of mandatory detention throughout the 1990s, which caused the immigration detention population to skyrocket and strengthened an enforcement-focused agency culture within the INS.⁶⁰ Between 1995 and 2011, the average daily immigration detention population quadrupled and the total yearly detention population increased more than fivefold.⁶¹

This rise in detention shifted its framing for both USMS and INS. Instead of deciding *whether* detention was needed on a case-by-case basis, both agencies became focused on finding space for individuals who would be detained by default, transforming bedspace from a discretionary decision into a commodity—and a scarce one at that. Even though the USMS and the INS were at the time both part of the Department of Justice (DOJ), they were in direct competition for bedspace in the 1980s and 1990s, occasionally

57. *Fact Sheet: Overview*, U.S. MARSHALS SERV. (Feb. 25, 2020), <https://www.usmarshals.gov/duties/factsheets/overview.pdf> (last accessed Oct. 31, 2020).

58. Seth Freed Wessler, *Inside the US Marshals' Secretive, Deadly Detention Empire*, MOTHER JONES (Nov./Dec. 2019) <https://www.motherjones.com/crime-justice/2019/10/inside-the-us-marshals-secretive-deadly-detention-empire/>.

59. *Id.*

60. Knowles & Heeren, *supra* note 7, at 21, 23.

61. DORIS MEISSNER, DONALD M. KERWIN, MUZAFFAR CHISHTI & CLAIRE BERGERON, IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY, MIGRATION POL'Y INST. 125 (2013) <https://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery>.

engaging in “price bidding wars” for local jail space.⁶² Both USMS and INS entered their first contracts with private prison companies in the mid-1980s as well.⁶³ The competition between the USMS and INS led to the creation of a special office to coordinate detention for both agencies within the DOJ known as the Office of the Federal Detention Trustee (OFDT) in 2001. The OFDT’s ultimately ill-fated goal was to direct the use of detention resources for INS and USMS and centralize intergovernmental agreements for both agencies.⁶⁴

Prior to 2002, and especially once the OFDT was established, it made sense to authorize INS and the BOP on the same intergovernmental agreements signed by the USMS because they were all sister agencies within the DOJ that reported to the Attorney General.⁶⁵ There was also clear statutory authority for it: the statutes authorizing both USMS and INS to use appropriated funds to house detainees vested authority in the Attorney General to do so.⁶⁶ And regulations explicitly entrusted the USMS with “[c]oordination and direction of the relationship of the offices of U.S. Marshals with the other organizational units of the Department of Justice.”⁶⁷ However, the INS was dissolved and its functions moved to the newly created Department of Homeland Security in 2002.⁶⁸ After that, the OFDT no longer had authority to oversee ICE detention activities.⁶⁹ Although ICE continued to be authorized to contract directly with local governments for detention space,⁷⁰ there

62. See Memorandum ER/20.75.44-C from Thomas M. Baranick, Office of Detention and Deportation-Eastern to Carolyn B. Mackey, Office of Budget and Accounting-Eastern, Subject: Jail Agreement Bills (Feb. 7, 1992), available at <https://www.ice.gov/doclib/foia/isa/igsapassaicountyjail.pdf> (suggesting raising IGSA rates at three IGSA facilities in order “to avoid ‘price bidding wars’ with the . . . USMS”).

63. CODY MASON, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION, THE SENTENCING PROJECT 4 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Dollars-and-Detainees.pdf>.

64. Memorandum from Stephen Colgate, Assistant Att’y Gen. for Admin. to the Att’y Gen., Dep’t of Justice (Feb. 12, 2001), available at https://www.justice.gov/archive/ofdt/ag_memo_ofdt_2001.pdf.

65. See *id.* (including an organizational chart of the Department of Justice in which USMS, INS, BOP, and OFDT all reported to the Deputy Attorney General).

66. 8 U.S.C. § 1103(a)(9) (2018) (“The Attorney General, in support of persons in administrative detention in non-Federal institutions, is authorized- (A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for . . . the housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State.”); 28 U.S.C. § 530C(b)(7) (2018) (“Funds available to the Attorney General for the Detention Trustee may be used for all the activities of such Trustee in the exercise of all power and functions authorized by law relating to the detention of Federal prisoners in non-Federal institutions or otherwise in the custody of the United States Marshals Service and to the detention of aliens in the custody of the Immigration and Naturalization Service, including the overseeing of construction of detention facilities or for housing related to such detention. . . .”).

67. 28 CFR § 0.111 (2000).

68. Homeland Security Act of 2002, H.R. 5005, 107th Cong. § 471(a) (2002) (“Upon completion of all transfers from the Immigration and Naturalization Service as provided for by this Act, the Immigration and Naturalization Service of the Department of Justice is abolished.”).

69. OFFICE OF THE INSPECTOR GEN., AUDIT OF THE DEP’T OF JUSTICE OFFICE OF THE FEDERAL DETENTION TRUSTEE 9-10 (2004), available at <https://oig.justice.gov/reports/OBD/a0504/final.pdf>.

70. The amended INA contains the exact same language authorizing the Attorney General to form detention agreements with local governments, now under the heading of “Secretary of Homeland

was no longer a clear statutory basis allowing it to do so through USMS agreements. The newly-created ICE and OFDT began negotiations for an interagency agreement to continue coordination of detention agreements, a process that was plagued by disagreement and took nearly a year to conclude.⁷¹ The interagency agreement was finally signed in January 2004, and “establish[ed] OFDT as a procurement service provider to ICE.”⁷² The authority for ICE to use USMS agreements therefore appears to have changed from being one of statute to one created by interagency contract. However, ICE continued to use USMS agreements, including the preexisting agreements that had authorized the INS, often without so much as updating them, as if the change were one of name only and not of structure.⁷³

According to ICE, one of the reasons the interagency agreement was so contentious was the fact that immigration detainees have a right to certain privileges that criminal inmates do not, and ICE was concerned that “the detention facilities procured by the OFDT might be more suitable for the criminal detainees in the custody of the USMS.”⁷⁴ However, an alternative explanation might be that ICE was seeking to assert its independence as an agency. Agencies—and the bureaucrats within them—seek to increase not only their own power and budgets, but also their autonomy.⁷⁵ This is particularly true when a new agency—such as ICE in 2003—seeks to carve out its “turf” by identifying tasks that are not already performed by other agencies.⁷⁶ This theoretical framework suggests that the resistance from ICE, and later

Security,” and is the section that ICE points to justify this authority. *See, e.g.*, OFFICE OF INSPECTOR GEN., IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES 18 (2018) (Appendix C to OIG Report 18-53), <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf> (asserting that “ICE’s IGSA authority is codified at 8 USC § 1103(a)(11)(A)”). But despite being listed under this heading, the subsection itself still refers to the Attorney General and the “Service,” *not* the Secretary of Homeland Security or ICE. 8 USC § 1103(a)(11)(A) (2018) (“The Attorney General . . . is authorized—(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for . . . housing, care, and security of persons detained by the Service pursuant to Federal law under an agreement with a State or political subdivision of a State.”).

71. OFFICE OF THE INSPECTOR GEN., *supra* note 68, at 10.

72. *Dep’t of Homeland Security Appropriations for Fiscal Year 2005: Hearing on H.R. 4567 Before the Subcomm. of the U.S. Senate Comm. on Appropriations*, 108th Cong. 74 (2004), <https://www.govinfo.gov/content/pkg/CHRG-108shrg3910498/pdf/CHRG-108shrg3910498.pdf>; OFFICE OF THE INSPECTOR GEN., *supra* note 68, at 10. The authority for the interagency agreement was found in the October 2003 Conference Report on the Fiscal Year 2004 appropriations, which “directed the Justice Department ‘to develop Memoranda of Understanding with the Department of Homeland Security . . . regarding the continued integration of . . . detention bed space needs.’” Office of the Attorney General; Establishment of the Office of the Federal Detention Trustee, 71 Fed. Reg. 36192 (June 26, 2006) (quoting H.R. Rep. No. 108-401, 108th Cong., 1st Sess., 516 (2003)).

73. *See, e.g.*, IGA No. 89-00-0133 between the USMS and Kenosha County Jail, WI, IMMIGR. CUSTOMS AND ENF’T (Aug. 1, 2000), available at <https://www.ice.gov/doclib/foia/fisa/kenoshacountyjailwi-igsa-mod-191-03.pdf> (authorizing INS on the original USMS IGA and referring to the “INS” on a modification from June 2003). This agreement, which authorizes the INS, is currently provided on ICE’s FOIA website. *Id.* ICE continued to use the Kenosha County Jail in Fiscal Year 2020. *ICE Data Feb. 2020*, *supra* note 10.

74. OFFICE OF THE INSPECTOR GEN., *supra* note 68, at 10.

75. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 181-82 (1991).

76. *Id.* at 189.

the USMS, to OFDT control was motivated by a desire on the part of both agencies to increase their own autonomy. Ultimately, OFDT lost the turf battle, and was absorbed into the USMS in 2012.⁷⁷

The early years of ICE within DHS also gave a definitive upper hand to the pro-enforcement elements of the immigration bureaucracy that have since “pursued immigration enforcement with a level of fanaticism unseen in recent memory.”⁷⁸ While ICE’s detention machinery continued its rampant expansion, the population of USMS detainees experienced its own immigration-related explosion from the detention of immigrants awaiting criminal trial in USMS custody.⁷⁹ Operation Streamline, a federal policy implemented in 2005, mandates the criminal prosecution of every person caught crossing the border, meaning the government prosecutes dozens of defendants at a time⁸⁰ and sometimes as many as 200 defendants per day in the busiest districts.⁸¹ In 2013, 47% of all federal prosecutions were for immigration charges,⁸² and immigration defendants are almost always held pending those charges,⁸³ resulting in significant cost⁸⁴ and pressure on the USMS for additional bedspace.⁸⁵

These pressures further entrenched the potential for competition between USMS and ICE, as well as the framing of detention as a procurement problem rather than a policy choice. While incentives for each agency to increase its own control and autonomy pushed against the use of authorizing ICE on USMS or OFDT agreements, the market-based framing of federal detention simultaneously required the agencies to coordinate. In the USMS’s most recent budget, it recognized this motivation explicitly by pointing to its collaboration with ICE as a cost-containment measure. In its words, “The USMS will continue to partner with [ICE] and BOP as appropriate on joint-

77. *Office of the Federal Detention Trustee*, DEP’T OF JUSTICE ARCHIVES, <https://www.justice.gov/archive/ofdt/> (last accessed Nov. 1, 2020).

78. Knowles & Heeren, *supra* note 7, at 25-28.

79. See Hanna Kozłowska, *The Private-Prison Industry Has One Big Client That No One Talks About*, QUARTZ (June 13, 2017), <https://qz.com/1002854/the-private-prison-industry-has-one-big-client-that-no-one-talks-about/> (reporting that “the fastest-growing population within USMS detention, by far, is immigration offenders,” who accounted for 35% of all USMS bookings in 2016).

80. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 223-24 (2015); MICHAEL CORRADINI, JONATHAN ALLEN KRINGEN, LAURA SIMICH, KAREN BERBERICH, & MEREDITH EMIGH, *OPERATION STREAMLINE: NO EVIDENCE THAT CRIMINAL PROSECUTION DETERS MIGRATION*, VERA INST. 7 (2018), https://www.vera.org/downloads/publications/operation_streamline-report.pdf.

81. Solomon Moore, *Push on Immigration Crimes is Said to Shift Focus*, N.Y. TIMES (Jan. 11, 2009), <https://www.nytimes.com/2009/01/12/us/12prosecute.html>.

82. CORRADINI ET AL., *supra* note 79, at 7.

83. This trend creates a striking racial disparity, in which “[n]early 9 out of 10 Latino federal defendants are detained while they await trial.” Freed Wessler, *supra* note 57.

84. See Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 114, 120-21 (2013) (quoting one magistrate judge’s frustrated outburst that “[w]hat in the world is the U.S. Attorney doing spending over \$5,000 of taxpayer funds to prosecute this person?”); see also Moore, *supra* note 80 (describing how the rise in immigration prosecution has resulted in a lack of resources for federal prosecutors to investigate and pursue other law enforcement priorities).

85. See Freed Wessler, *supra* note 57 (quoting a former USMS official as saying “They’re looking for beds wherever they can find them. They’ll take whatever they can get.”); *Marshals’ Lawlessness*, NPR (Oct. 23, 2019), <https://www.npr.org/2019/10/22/772452187/marshals-lawlessness>.

use facilities to achieve the best cost to the Government. In this procurement process . . . [a]pproaching the negotiating process together eliminates the potential for competition between agencies.”⁸⁶

Although local jails are not likely concerned with the inter-agency dynamics between the USMS and ICE, there are plenty of incentives for them to view detention as a business rather than policy as well. One incentive is that these contractual relationships shield them from local accountability, in the sense that the federal government is responsible for the number of detainees while the jails just house them. One commissioner defended his county’s ICE contract by saying, “We’re not doing anything but providing a bed for them. . . like a motel room.”⁸⁷ Other officials have used this logic to advocate for local participation in ICE detention, reasoning that if detention is inevitable, the local community should at least profit from it.⁸⁸ Local sheriffs tend to support an aggressive enforcement agenda;⁸⁹ in the context of federal detention contracts, however, the separation of the functions of arrests and detention means that even local officials who might be politically opposed to mass incarceration can disclaim their role in furthering those policies. In other words, framing detention as a procurement allows local officials to profit from federal policies without taking political responsibility for them. Of course, this deflection of responsibility is not unique to ICE detention through USMS contracts, but it is particularly salient given that USMS detention is much less politically controversial than ICE detention.

Regardless of how local officials viewed the shift in federal detention policies, they stood to profit immensely from them.⁹⁰ The same political wave that propelled the rise in federal detention led many local communities to invest in their own jail space, and those larger jails became more expensive

86. U.S. MARSHALS SERVICE, FY 2020 PERFORMANCE BUDGET, FEDERAL PRISONER DETENTION APPROPRIATION, U.S. DEPT. OF JUSTICE 26 (2019), <https://www.justice.gov/jmd/page/file/1144161/download>.

87. Emily Ryo & Ian Peacock, *Jailing Immigrant Detainees: A National Study of County Participation in Immigration Detention, 1983-2013*, 54 L. & SOC. REV. 66, 91 (2019) (quoting 2018 report).

88. James Gemmill, *State Rep Fumes Over Gov. Whitmer’s Block of Immigration-Detention Center*, FOX 17 W. MICH. (Feb. 16, 2019), <https://fox17online.com/2019/02/16/state-rep-fumes-over-gov-whitmers-block-of-immigration-detention-center/> (quoting a Michigan state official’s dissatisfaction with the governor’s decision not to allow the sale of a state facility to be used as an ICE detention center, saying “I would really like to know what the governor’s plan is to bring 250 well-paying jobs to Ionia . . . Like it or not, people that come into this country illegally are going to be detained.”).

89. See Jennifer Chacon, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1377 (2019) (“[S]heriffs’ departments nationally tend to be more uniform, and more uniformly procooperation than police chiefs, who have policy preferences that are more closely tied with the policy preferences of the local governing boards in the jurisdictions they police.”); see also Joseph Summerill & Marshall Weeks, *Legal Update: Local Law Enforcement and Federal Immigration Law, Part 1*, THE MO. SHERIFF 36 (2011), <http://foursjj.com/wp-content/uploads/2015/05/Legal-Update-Local-Law-Enforcement-compressed.pdf> (“While the topic of illegal immigration remains highly controversial in local communities across America, local law enforcement’s attitude regarding the level of controversy . . . appears to be different.”).

90. See GOTTSCHALK, *supra* note 79, at 38 (“For cash-strapped states and municipalities, the federal government’s inmates and detainees are tantalizing cash cows.”).

to maintain.⁹¹ For rural localities suffering from economic stagnation, importing inmates, whether from state corrections departments, other states, or the federal government, can be profitable business.⁹² Even comparatively small facilities receive significant income from housing and transporting federal detainees.⁹³ From the perspective of a sheriff or a county commissioner worrying about the bottom line, there is little difference between an immigration, pretrial, or criminal detainee.⁹⁴ USMS contracts that authorize ICE and BOP likewise draw no distinctions. This may be another reason so few IGAs were modified after INS became ICE: it simply made no difference to the local jails.

ICE detainees are civil detainees, but in most local jails they are housed alongside local inmates.⁹⁵ Much has been thoughtfully written about how this combination of civil and criminal incarceration reinforces perceptions of immigrant criminality for the public⁹⁶ and the employees of those facilities.⁹⁷ It is also possible that a similar symbolic function takes place when USMS agreements authorize ICE and BOP. Like immigrant detainees, pretrial detainees in USMS custody are civil detainees and their detention is nominally not punitive because they have not been convicted of any crime and are entitled to a presumption of innocence. But once they are convicted, they continue to be held through the same agreement, but now in BOP custody. The parallel structure defining “federal detainees” in most USMS agreements suggests an analogous function for ICE detention: “individuals charged with federal offenses . . . while awaiting trial . . . and individuals who are awaiting a hearing on their immigration status or deportation.”⁹⁸ Similarly, individuals are held in USMS custody to be sentenced *en masse* for low-level immigration crimes through Operation Streamline and then shuffled directly into ICE

91. Ryo & Peacock, *supra* note 86, at 75–76.

92. GOTTSCHALK, *supra* note 79, at 37–39.

93. For example, from October 2019 to February 2020, Cambria County had an average daily population of 40 ICE detainees, and even fewer USMS detainees. *ICE Feb. 2020 Data*, *supra* note 10. In that same time period, though, it received a total of almost a half a million dollars from the federal government for housing and transporting USMS and ICE detainees. Right-to-Know Request Response from Cambria County, Pa. to author (April 9, 2020) (on file with author) (listing \$450,455.16 in combined income from those sources from October 2019–February 2020).

94. Unless, of course, there is a difference in price, which does occur in some USMS CDF contracts, or when ICE negotiates its own agreement separately. But those differences reinforce, rather than undermine, the procurement framing of detention.

95. García Hernández, *supra* note 5, at 255.

96. Ryo & Peacock, *supra* note 86, at 92–93; García Hernández, *supra* note 5, at 282 (“The very fact of imprisonment creates a perception of dangerousness from which it is difficult to escape.”).

97. See Rendell Presentation, *supra* note 7 (quoting a corrections officer as saying “They’re no different, you know why? Because they’re in here. . . . No way you’re in here and you ain’t did nothin’. Them ICE boys is murders, rapists, just like the others”); ARMENTA, *supra* note 1, at 146 (“Although the [287 (g)] program was initially sold to the public as a way to . . . identify[] serious criminals, as it continued, the logic of Davidson County officials changed. That is, the boundaries of criminality expanded to include any noncitizen who had been arrested, because that person was a ‘criminal’ who might commit a more serious violation someday.”) (emphasis omitted).

98. See, e.g., IGA No. 68-02-0113 between Cambria County, PA and U.S. Marshals Serv., U.S. MARSHALS SERV. (Sep. 24, 2002), https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/pennsylvania/cambria_county_prison.pdf (last accessed Nov. 1, 2020).

custody, or they leave state and federal criminal custody directly for immigration detention. This constant churning of the same bodies, in the same spaces, through pretrial, immigration, and criminal custody, only strengthens the inference that the civil/criminal division exists on paper only. USMS IGAs take this reality a step further by authorizing all those kinds of detention in a single document, sending a message that all federal detainees are the same: criminal.

B. *The Negotiation Process*

Given the many incentives to treat these intergovernmental agreements as procurement contracts, the agreements' formation process has also evolved to reflect that framing. The negotiation process has become both increasingly technocratic and informal, with serious implications for the democratic legitimacy of these agreements.

1. *A Historical Preoccupation with Price*

USMS and ICE are not bound by the government contracting regulations in the Federal Acquisition Regulations (FAR) when contracting with local facilities. As far back as 1982, the Office of Management and Budget (OMB) granted an exception that allowed INS, the USMS, and the BOP to contract with local jails outside the scope of the FAR.⁹⁹ Instead, those intergovernmental agreements were governed by the guidelines in OMB Circular A-87, which applies to grants and “cost reimbursement contracts” in which local or state governments administer federal programs.¹⁰⁰ It “establishes principles and standards to provide a uniform approach for determining costs and to promote effective program delivery, efficiency, and better relationships between governmental units and the Federal Government.”¹⁰¹ Both agencies were later authorized by statute to contract directly with local governments for jail space,¹⁰² but those contracts continued to be governed by OMB Circular A-87. For several years, both agencies “read the enabling statutes and Circular A-87 to preclude IGAs from including a payment of profit or fee in excess of actual costs.”¹⁰³

99. See Memorandum from Craig Unger, Fed. Det. Tr. to Larry Thompson, Deputy Att’y Gen., Re: Intergovernmental Agreements at 1 (Aug. 1, 2002) (Appendix VIII to DOJ OIG Report 07-26, Oversight of Intergovernmental Agreements by the United States Marshals Service and the Office of the Federal Detention (March 2007)) (citing the Oct. 4, 1982 letter from David Stockman, OMB Dir., to Kevin Rooney, Assistant Att’y General for Administration), available at <https://oig.justice.gov/reports/USMS/a0726/app8.htm>.

100. Memorandum from Alice M. Rivlin, Dir., OMB Circular A-87, Cost Principles for State, Local, and Indian Tribal Governments (May 4, 1995), <https://clintonwhitehouse4.archives.gov/OMB/circulars/a087/a087-lett.html>.

101. *Id.*

102. 8 U.S.C. § 1103(a)(11)(A); 18 U.S.C. §§ 4003, 4006, 4013(a)(3) (2018).

103. Unger Memorandum, *supra* note 98, at 2. In 2013, OMB Circular A-87 was superseded by a streamlined regulation now found in Title 2 of the Code of Federal Regulation. See Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg.

But as demand for bedspace rose, OFDT took the position that intergovernmental detention contracts could include reimbursement for reasonable costs and fees, which would allow the agency to enter into fixed-price agreements with local facilities rather than monitoring actual costs.¹⁰⁴ To support this position, it cited Section 119 of the Department of Justice Appropriations Acts of 2001, which stated that “the Attorney General hereafter may enter into contracts. . . for detention or incarceration space or facilities . . . on any reasonable basis.”¹⁰⁵ DOJ’s Inspector General initially disagreed, objecting that it “would allow the Department to enter into an IGA that is, in effect, a fixed-price contract as contemplated in FAR while avoiding numerous FAR requirements that have been objected to by state and local governments”¹⁰⁶ The Office of Legal Counsel weighed in on the debate in December 2002, determining that the 2001 Act provided ongoing authority to enter into fixed-price IGAs because the phrase “on any reasonable basis” could include factors other than actual cost so long as they were reasonable.¹⁰⁷ The OFDT instructed the USMS not to recoup payments made to local jails that exceeded costs.¹⁰⁸ And the Inspector General eventually conceded that “at least since the passage of Section 119, the USMS has the authority to enter IGAs based on other factors, and that accordingly profit may be included in the calculation of the IGA rate.”¹⁰⁹ IGAs signed prior to 2001 rarely cited any statutory authority at all, but beginning in 2002 began including a citation to Section 119 in the form language of most contracts.

Largely missing from this intra-agency tiff about fixed-price IGAs is any reference to the policy justifications underlying the more generous contracting standards for federal detention in local government. Of course, a federalism-oriented policy of encouraging intergovernmental contracting assumes a level of transparency and political input that simply does not exist in practice, perhaps because none of the actors involved have articulated these justifications. However, principles of cooperative federalism theoretically could have done much of the work in justifying these agreements’ exemption from regular procurement standards. Some potential justifications include that these agreements are more like cooperative treaties between sovereigns than private contracts,¹¹⁰

78590, 78590, 78592 (Dec. 26, 2013) (“This final guidance supersedes and streamlines requirements from OMB Circulars A-21, A-87, A-110, and A-122. . . .”).

104. *Id.*

105. Dep’t of Justice Appropriations Act of 2001, H.R. 3303, 105th Cong. (1998).

106. Memorandum from Glenn Fine, Inspector Gen., to Larry Thompson, Deputy Att’y Gen. (Sept. 18, 2002) (Appendix IX of OIG Report 07-26, *supra* note 98).

107. See Joseph Summerill, *Federal Government Opens Door for Fixed-Price Intergovernmental Agreements*, CORRECTIONS TODAY 98, 99 (June 2003), <http://foursjj.com/wp-content/uploads/2015/05/Federal-Government-Opens-the-Door-for-Fixed.compressed.pdf>.

108. OFFICE OF THE INSPECTOR GEN., OVERSIGHT OF INTERGOVERNMENTAL AGREEMENTS BY THE UNITED STATES MARSHALS SERVICE AND THE OFFICE OF THE FEDERAL DETENTION TRUSTEE v (2007), available at <https://oig.justice.gov/reports/USMS/a0726/index.htm>

109. *Id.* at vi.

110. See Fahey, *supra* note 27, at 2409 (suggesting that treaty law is one appropriate analogue for understanding intergovernmental agreements).

both levels of government have an interest in minimizing costs to their shared taxpaying citizens,¹¹¹ and because there is a public interest in ensuring that some functions, such as the ability to constrain individual liberty, are at least the function of a government rather than a private party.¹¹²

Regardless, if those concerns were at play when Congress passed the enabling statutes, it is safe to say the nuance was lost on the agencies. The OFDT, USMS,¹¹³ and ICE have taken the position that the agreements are procurement contracts rather than cooperative agreements, and justify the exemption from the FAR as a necessity of the market rather than on any principles of cooperative federalism. ICE has made this point unambiguously by saying that “an IGSA is not a cooperative agreement. A cooperative agreement is used to transfer a thing of value . . . whereas a procurement contract is used when the principal purpose is to obtain services or property.”¹¹⁴ But this view of what these agreements *are* creates an inherent tension. Either an agreement is a procurement contract and should be subject to the regulations that come with that, or it is an inter-governmental agreement in which sovereign authorities cooperate to detain individuals and pay the corresponding fiscal *and* political costs. The federal government should not be able to have it both ways merely because local governments would not agree otherwise.

Despite the federal preoccupation with bending over backwards to attract local governments, the shift to fixed-price agreements may have actually raised the stakes for local sheriffs in the negotiation process. Local jails could potentially receive a significant profit from USMS contracts, but if they calculated a rate that did not cover their costs or did not allow for price adjustment, they could be left on the hook for substantial amounts of money.¹¹⁵ Figuring out how much it actually costs to detain a federal inmate for a day can be quite difficult. Local jails frequently invest heavily to expand jail facilities, sometimes with private prison financing.¹¹⁶ Other local jails sign USMS detention agreements alongside “Cooperative Agreement Programs” for construction to expand jail facilities, which allowed them to meet the federal demand for bedspace

111. Cf. *id.* at 2378 (discussing the 1845 case *Searight v. Stokes*, in which “The Court, in short, assumed (however farfetched it may seem in some contexts today) that in a federalist system, our domestic governments do not bargain ‘with adverse interests,’ but are instead ‘concerned in the welfare of each other’ to the extent ‘consistent’ with the interests of their constituents. . . . What each government does inevitably impacts the other and they know this.”).

112. Cf. PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY* 39–41 (2007) (discussing whether prison management is an inherent government function that should not be contracted).

113. Unger Memorandum, *supra* note 98, at 6 (“We propose, in future IGAs where circumstances exist in which the local authority will not agree to reimbursement of actual costs, a fixed-price vehicle should be considered . . .”).

114. Homan Memorandum, *supra* note 69, at 19.

115. Summerill, *supra* note 106, at 99.

116. See *Doing Borrowed Time: The High Cost of Back-Door Prison Finance*, JUSTICE STRATEGIES (Jan. 1, 2007) <https://justicestrategies.org/publications/2007/doing-borrowed-time-high-cost-back-door-prison-finance> (last accessed Nov. 1, 2020).

in return for a guaranteed period of time that the contract would remain in effect.¹¹⁷ Either way, this investment then creates an ongoing dependence on the federal government to fill that bedspace as jails became larger and more expensive to operate.¹¹⁸ Those operational costs are fixed or rise over time, meaning the cost per detainee fluctuates depending on the total population.¹¹⁹ As one county administrator crudely put it, “We have to turn the oven on whether we’re making 200 biscuits or 400 biscuits.”¹²⁰

2. *Negotiation by Algorithm: The eIGA*

In an effort to achieve greater efficiency and make the process easier, the OFDT created the “eIGA” in 2006.¹²¹ Local governments log on to an online portal and submit an application for the IGA with information about operating costs.¹²² And USMS contracting officers then compare those costs with the rates for similar facilities, historic rates, and USMS’s own algorithm to negotiate a per-diem rate.¹²³ ICE also uses the eIGA system.¹²⁴ Some USMS agreements, signed since the eIGA was developed, specify that payment is not based on actual costs, but that any change to the negotiated per diem rate must be done through the eIGA system.¹²⁵

The eIGA process adds yet another layer of bureaucracy perpetuating the framing of detention as procurement, and it creates yet another niche for subcontractors to profit from detention. For instance, the Summerill Group, LLC now markets its “proprietary cloud based algorithms” as a way for local and city governments to maximize their profits by subcontracting the negotiation process itself.¹²⁶ The company uses its algorithm to calculate a proposed rate,

117. See, e.g., *IGA J-C28-M-061 between USMS and Marion County, IN*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/indiana/marion_county_jail.pdf (last accessed Nov. 1, 2020) (stating that the agreement will be in effect for 15 years from the completion of the CAP, and indefinite thereafter).

118. See *Doing Borrowed Time*, *supra* note 115.

119. Chelsea McDougall, *McHenry County Jail Rental Program with Feds Hard to Quantify*, NW HERALD (Dec. 29, 2014), <https://www.nwherald.com/2014/12/23/mchenry-county-jail-rental-program-with-feds-hard-to-quantify/adstmnz2/>.

120. *Id.*

121. Joseph Summerill & David Goodwin, *Negotiating a New Per-Diem Rate for Housing Federal Prisoners*, 1 MO. SHERIFF 20 (2009), <http://foursjj.com/wp-content/uploads/2015/05/Negotiating-a-New-Per-Diem-Rate.compressed.pdf>.

122. See generally U.S. DEP’T OF JUST., OFFICE OF THE FED. DET. TR., *eIGA FACILITY USER HANDBOOK* (2009), https://ows.usdoj.gov/IGA/eIGA_Facility_Guide.pdf (providing step-by-step instructions for local governments using the eIGA system).

123. Joseph Summerill, *Housing Prisoners in Local Jails: How to Negotiate an “eIGA” with the US Marshals Service*, 27 CAL. SHERIFF 20 (2012), <http://foursjj.com/wp-content/uploads/2015/05/Housing-Federal-Prisoners-in-Local-Jails.compressed.pdf>.

124. *eIGA FACILITY USER HANDBOOK*, *supra* note 121. Presumably this occurs under the authorization of the interagency agreement with OFDT, but it is impossible to know without seeing that document.

125. *IGA 79-07-0006 between USMS and Brooks Cty., Tex.*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/texas/brooks_county_detention_center.pdf (last accessed Nov. 1, 2020) (“[I]f a per-diem rate adjustment is desired, the Local Government shall submit a request through the Office of the Federal Detention Trustee’s (OFDT) electronic Intergovernmental Agreements (eIGA) area of the Detention Services Network (DSNetwork).”).

126. *About the Summerill Group, LLC*, SUMMERILL GROUP, <https://josephsummerill.com/about-us/> (last accessed Nov. 1, 2020).

prepares the application, and “partners” with the local government during the review and negotiation of the application.¹²⁷ Outsourcing the negotiation process this way delegitimizes the resulting IGAs as a form of lawmaking, because the elected officials are no longer taking responsibility for the decision-making process.¹²⁸ On a more concrete level, it can also limit transparency by insulating the process from public oversight. For instance, one county denied my request for communications regarding the negotiation of its per diem rate as an exempted “trade secret,” because the prison had “contracted with a private company to negotiate on [its] behalf.”¹²⁹

3. *Disorganized Bureaucracy*

Intergovernmental detention agreements, whether with the USMS or ICE, are generally signed on behalf of the local government by a sheriff, warden, or county official such as a commissioner. The processes for approval vary by locality. On the federal side, both USMS¹³⁰ and ICE have designated contracting officers that are able to sign on behalf of the agency. The 2014 deposition of a former ICE contracting officer regarding the functions of what he described as “the contracting shop for ICE”¹³¹ depicted a process in disarray: each individual officer maintained their files according to their own system,¹³² few contracts were stored electronically,¹³³ and standardized guidelines were nearly nonexistent.¹³⁴ When asked whether ICE even maintained a master list of all its contracts, he replied: “I believe we do somewhere. It’s not a formal list.”¹³⁵ At one point, ICE instituted guidances known as “ICECAPs” to standardize negotiation procedures, but later abandoned those standards and now only follows templates and checklists to create IGSAAs.¹³⁶ Even when they existed, those uniform procedures never applied to USMS

127. *Id.*

128. VERKUIL, *supra* note 111, at 43 (“If the contractor does all the work to prepare a decision, has the decision line itself been crossed? When an official rubber-stamps a contractor’s recommendation, who is performing the government function?”).

129. Right-to-Know Request Response from Lackawanna Cty. to author (Mar. 3, 2020) (on file with author). “A record that constitutes or reveals a trade secret or confidential proprietary information” is exempt from disclosure under Pennsylvania’s Right to Know Law. 65 PA. STAT. AND CONS. STAT. ANN § 67.708(b)(11) (West 2020).

130. *See* U.S. SERVICE POLICY DIRECTIVES, PROCUREMENT AUTHORITY AND OVERSIGHT, U.S. MARSHALS SERV. (Mar. 17, 2009), <https://www.usmarshals.gov/foia/directives/procurement.pdf> (last accessed Nov. 1, 2020).

131. *Dep. of Jerald Neveleff, Nat’l Immigrant Justice Ctr. v. DHS*, No. 1:12-cv-5358 at *35 (N.D. Ill. Jan. 29, 2014), <https://www.documentcloud.org/documents/2105816-neveleffs-deposition.html> [hereinafter Neveleff Dep.].

132. *Id.* at 91-92.

133. *Id.* at 50-51, 150-54.

134. *Id.* at 125.

135. *Id.* at 116-17.

136. U.S. DEP’T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GEN., OIG-18-53, IMMIGRATION AND CUSTOMS ENFORCEMENT DID NOT FOLLOW FEDERAL PROCUREMENT GUIDELINES WHEN CONTRACTING FOR DETENTION SERVICES (Feb. 21, 2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-02/OIG-18-53-Feb18.pdf> (noting that ICE no longer uses the ICECAP, and that “[t]emplates and checklists are not an adequate substitution for current written policy and procedures”); Neveleff Dep., *supra* note 125, at 69.

agreements,¹³⁷ meaning there were never any formal guidelines standardizing ICE's negotiations with local governments using USMS contracts. ICE does not have automatic access to USMS agreements, even when it is authorized as an agency user.¹³⁸ Rather, the USMS maintains those documents. The USMS is the sole agency authorized to change or negotiate terms with local governments and only updates ICE when it changes the agreement.¹³⁹ This sometimes does not even happen, meaning ICE is not aware when the USMS has made a contractual commitment that binds it: according to that deposition, "in the past the field office would receive an invoice at a rate that they don't recognize. . . . that's when we become aware that the Marshals have made a change to their agreement."¹⁴⁰

This ad-hoc process spills over into an informal communication style with local governments, a cavalier attitude towards the documents themselves, and a lack of familiarity with their actual contents. For example, one county denied my request for the agreement because they did not house prisoners for the USMS. When I pointed out that a version of the requested agreement was already available on the USMS website, the county stated that they had to conduct an additional investigation into that "new information."¹⁴¹ Another county provided a copy of the agreement, but when I asked why it had not included a modification despite a clearly different per diem rate in the financial records, responded that most likely "something as simple as a rate change was simply confirmed in a phone conversation and showed up on the next billing, or that it was confirmed in an email which has long been purged out of our system."¹⁴² The practice of working out key details of detention agreements by phone or email thereby further undermines transparency.

C. *The Day-to-Day Detention Process*

Once the contracts are negotiated, the dynamics described above continue to influence day-to-day interactions between local facilities and ICE in several ways. First, the federal preoccupation with attracting local cooperation has been a factor in the lax federal oversight of local jails. Next, the "task order" structure that ICE uses to fund detention services explicitly affirms the procurement framing of detention agreements. Finally, while not unique to USMS contracts, ICE and local governments sometimes use the agreements to transfer local inmates into ICE detention without ICE physically appearing to take custody and request the transfer, resulting in an effective end-run around detainees. The intergovernmental agreements do not even purport to

137. OIG-18-53, *supra* note 69, at 21, n. 12.

138. Neveleff Dep., *supra* note 125, at 77.

139. *Id.*

140. *Id.* at 157.

141. Appeal to the Pa. Office of Open Records of Right-to-Know-Law Requests 20-047, *et seq.*, at 2 (Apr. 8, 2020) (on file with author).

142. E-mail from Richard Perhaps, Erie Cty. Open Records Officer, to author (Apr. 20, 2020) (on file with author).

authorize such transfers, but the informal communication methods and business-transaction framing of detention combine in a way that local governments tend not to question the legality of the practice.

1. *Inspections and Oversight*

The competition between federal agencies for local jail space incentivizes the federal agencies to lower oversight standards for local facilities. While still overseeing the USMS, the OFDT tried to implement higher standards and more rigorous oversight but was bitterly resisted by the USMS, which was concerned that local governments would decline to contract with the USMS if it imposed tougher standards.¹⁴³ Although in theory the OFDT was supposed to coordinate detention oversight with the USMS, an Office of the Inspector General report from 2013 found that the offices did not coordinate, sometimes inspected the same facility, and used different standards to conduct their inspections.¹⁴⁴ The USMS inspections were significantly more lax, taking on average two hours to complete, compared to the three-day average that OFDT spent on its inspections.¹⁴⁵ The report noted that the USMS did not see ensuring compliance as a goal of its inspections¹⁴⁶ and staunchly opposed OFDT's efforts to heighten standards, particularly for smaller facilities.¹⁴⁷ When the OFDT was absorbed into the USMS, low standards with cursory inspections and nonexistent consequences became the norm for USMS contracts.¹⁴⁸ This nonexistence of meaningful oversight from the USMS has an intolerable human cost. Between June 2016 and June 2019, a shocking 158 people died in USMS custody, a rate even higher than deaths in ICE custody.¹⁴⁹ Yet the USMS routinely fails to investigate conditions or move detainees, and consistently gives those same facilities passing inspection scores.¹⁵⁰

ICE uses its own oversight standards to inspect facilities even when they use a USMS agreement, and the standards used for inspection vary based on when the agreement was signed.¹⁵¹ ICE has three methods of oversight: subcontracted inspections by the Nakamoto Group, inspections by ICE's own Office of Detention Oversight (ODO), and since 2010, placement of

143. Freed Wessler, *supra* note 57; *see also Marshals' Lawlessness*, *supra* note 84, at 26:30-27:50.

144. U.S. DEP'T OF JUSTICE, OFF. OF THE INSPECTOR GEN. AUDIT DIV., AUDIT REPORT 13-06, AUDIT OF THE U.S. DEP'T OF JUSTICE'S OVERSIGHT OF NON-FEDERAL DETENTION FACILITY INSPECTIONS 6-7 (2013), available at <https://oig.justice.gov/reports/2013/g7013008.pdf>.

145. *Id.* at 8.

146. *Id.* at 9.

147. *Id.* at 11.

148. Freed Wessler, *supra* note 57.

149. *Id.*

150. *Marshals' Lawlessness*, *supra* note 84, at 22:30.

151. U.S. DEP'T OF HOMELAND SEC., OFF. OF THE INSPECTOR GEN., OIG-18-67, ICE'S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMIC IMPROVEMENTS 2 (2018), <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

Detention Service Managers on-site in about 50 facilities.¹⁵² Nakamoto's inspections are especially insufficient. For example, for the same year and same facilities that were inspected by both groups, ODO identified 475 deficiencies and Nakamoto only found 209, which is especially alarming given that ODO only looks at half as many standards.¹⁵³ The Service Managers are better situated to report on compliance but lack authority to implement changes and are frequently ignored by the local ICE offices,¹⁵⁴ who even referred to the Service Managers as a "nuisance."¹⁵⁵ Although ICE oversight is nominally more demanding than USMS oversight, in recent years ICE has proposed changing its standards to the USMS system.¹⁵⁶

This concern that local governments would not be willing to house federal detainees if there were additional oversight probably has more to do with the competition between ICE and USMS than it does with local jails. Many rural counties rely on federal detention as an important revenue stream, and former USMS officials have admitted that, "The counties want the money the Marshals pay them . . . [The USMS] could be exerting more leverage."¹⁵⁷ However, exerting that leverage would not only require that USMS expend resources, it might put them at a comparative disadvantage to the more well-funded ICE—and the race to the bottom continues.

One local jail official provided a useful description of the inspection process from the local government's perspective, confirming that local jails are willing and eager to comply with federal standards but indicating that they are frustrated by the mixed messages regarding what is expected of them.¹⁵⁸ The jail in question had a USMS contract, which was primarily utilized by ICE and was contracted under the 2000 National Detention Standards (NDS). Inspectors told the official that the jail could request a waiver for certain requirements, but was later denied the waiver and marked deficient on subsequent inspections. The official expressed concern that those deficiencies could result in losing the contract with ICE, though in fact ICE had not moved its detainees out of the facility. The official was also unsure whether ICE's 2019 update to the 2000 NDS or the original 2000 NDS standards would control for its next inspection. This uncertainty led them to remark in

152. *Id.* at 2-3.

153. *Id.* at 7-8. The OIG Report also found that Nakamoto representatives frequently misrepresented the inspection activities they had undertaken, such as relying on statements of jail employees without verifying records, and stating that they had interviewed detainees when they had only asked basic questions in a group setting. *Id.* ICE's response to these findings was not to end its contract with Nakamoto, but rather randomly monitor Nakamoto's investigations. Johnson Statement, *supra* note 26, at 8.

154. OIG-18-67, *supra* note 150, at 14.

155. *Id.* at 15.

156. Freed Wessler, *supra* note 57. Although beyond the scope of this Note, Customs and Border Protection also sometimes houses detainees under USMS contracts, but does not conduct any oversight at all. *Id.*

157. Freed Wessler, *supra* note 57 (quoting former head of USMS Prisoner Operations, Jack Hildebrand).

158. The individual I spoke with requested anonymity. Notes of this conversation are on file with the author.

exasperation that, “with the federal government, I feel like the left hand doesn’t know what the right hand is doing. I’ll do whatever you guys want me to do; I just don’t know what you guys want me to do!”¹⁵⁹

2. *Basic Ordering Agreements and Legal Ambiguity*

Emails between Lehigh County, PA, and ICE give an example of both the negotiating process and day-to-day detention operations in action. In February 2017, an ICE official sent an email to Lehigh County, saying: “I am in the process of securing additional bedspace throughout Pennsylvania. The process has simplified from what we were doing a few months ago. Let me know if this is something you want to explore.”¹⁶⁰ A follow-up email also provided an example of federal solicitude in attracting local collaboration, saying, “We need space and can pretty much work with what you want to do . . . We are bringing the new facilities online under the older 2000 NDS right now.”¹⁶¹ The local jail’s response was similarly casual: “OK, we have an empty housing unit—what’s the next step?,” to which ICE asked, “[D]o you have a USMS contract?”¹⁶² At the end of May 2017, ICE notified the county that it now had funding available to move forward with the agreement. ICE also requested that the facility complete and return by email the Operational Review Self-Assessment checklist, “which is how inspections are typically done for facilities with a small average daily population,” and would let ICE know “what, if anything needs to be addressed.”¹⁶³ At about the same time, ICE sent Lehigh County a document known as a Basic Ordering Agreement that “establish[ed] detention services against U.S. Marshals Service Agreement (MSA) no. J-A66-M-003 with the County of Lehigh.”¹⁶⁴

Basic Ordering Agreements appear in the part of the federal regulatory code that would normally apply to government contracting with private parties, and are “written instrument[s] of understanding” but are not contracts. In essence, they are a price list for a future, but not guaranteed, order for bedspace.¹⁶⁵ They received some public attention in 2018 when ICE announced a program in Florida using them to assuage liability concerns for local jails honoring ICE detainers, by placing an “order” for 48-hour detention services reimbursable by ICE rather than simply asking a county to honor a

159. *Id.*

160. Email chain between ICE official and Mary Sabol, Dir. of Corr., Lehigh Cty., Pa. (Feb. 14, 2017) (on file with author).

161. *Id.*

162. *Id.*

163. Email chain between ICE official and Mary Sabol, Dir. of Corr., Lehigh Cty., Pa. (May 26, 2017) (missing comma in original) (on file with author). Facilities that house fewer than 10 detainees at a time or for under 72 hours inspect themselves using the Operational Review Self-Assessment. OIG-18-67, *supra* note 150, at 2 n. 3; Altman & Small, *supra* note 6, at 6.

164. Form 347, Order for Supplies or Services No. HSCEDM-17-F-IG193 (May 25, 2017) (on file with author).

165. 48 C.F.R. § 16.703(a) (2020).

detainer.¹⁶⁶ The logic underlying the practice was that the individual was in federal custody as long as the federal government was paying for their bed-space. Although that logic fits neatly with the procurement framing of inter-governmental contracts, the practice in Florida demonstrates the major limitations of that framing. A change in custody constitutes a new arrest on civil immigration grounds.¹⁶⁷ Thus, while a local government may choose to honor a detainer as a request, it remains a policy choice and the local government is not shielded from liability if it violates local or constitutional law in doing so.¹⁶⁸ In fact, a lawsuit in which a Florida county with a Basic Ordering Agreement kept a U.S. citizen in custody for multiple days is currently pending.¹⁶⁹

Although the exact same form used in Florida,¹⁷⁰ the Basic Ordering Agreement (or “Order for Supplies or Services”) functioned differently in Lehigh County. The agreement specified that the order was placed “against” the USMS agreement for up to a certain amount of money, and used the same per diem rate as the USMS contract.¹⁷¹ When that money runs out, ICE simply issues a new “task order” with additional funding. This task order form is not exclusive to USMS agreements, and is also used to authorize funding under directly negotiated ICE IGSA.¹⁷² This task-order structure contributes to the cavalier attitude toward the original IGAs, because the information the parties reference on a regular basis is not the terms in the IGA but the most recent purchase order.

Once the Basic Ordering Agreement authorizes a certain amount of funds against the USMS contract, most detainees are brought to the jail by ICE and released to ICE using the I-203 “Order to Detain or Release an Alien” form. ICE uses this form to track detainees as they move between detention centers, and it is the required document that “must accompany each newly arriving

166. Press Release, ICE, 17 Fla. Sheriffs Announce New Enforcement Partnership (Jan. 17, 2018), <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>.

167. *Basic Ordering Agreements: What You Need to Know*, S. POVERTY L. CTR. <https://www.splcenter.org/basic-ordering-agreements-what-you-need-know> (last accessed Nov. 1, 2020); *Fact Sheet on ICE’s New “Enforcement Partnerships” in Florida*, AM. C.L. UNION, <https://www.aclu.org/fact-sheet/faq-ices-new-enforcement-partnerships-florida> (last accessed Nov. 1, 2020).

168. *Id.*

169. See Motion for Summary Judgement, *Brown v. Ramsey*, No. 4:18-cv-10279-KMW [ECF 126] (Feb. 18, 2020), https://www.splcenter.org/sites/default/files/documents/brown_v._ramsay_motion_summary_judgment_2_18_2020.pdf.

170. See, e.g., *Sample Order for Supplies or Services*, S. POVERTY L. CTR., https://www.splcenter.org/sites/default/files/documents/sample_order_for_supplies_of_services.pdf.

171. Compare Form 347, *Order for Supplies or Services No. HSCEDM-17-F-IG193* (May 25, 2017), at 2 with IGA 66-19-0183 between USMS and Lehigh Cty., Pa., effective July 1, 1999. Although the number of the USMS agreement listed on the basic ordering agreement is different, this appears to have been a typo referring to an earlier agreement number. In fact, the USMS agreement does list the previous number—which matches the one on the basic ordering agreement—and says that it is being replaced.

172. See, e.g., *Order for Supplies or Services against DROIGSA-08-0013 between ICE and Chase Cty., Kan.*, <https://www.ice.gov/doclib/foia/isa/ChaseCountyKS-HSCEDM-16-F-IG140.pdf> (last accessed Nov. 1, 2020).

detainee” according to ICE detention standards.¹⁷³ While not explicitly designed as an end-run around detainers the way the Florida agreements were, the Basic Ordering Agreement system as used in Lehigh County can have the same effect when inmates who were already present in the jail are released from local charges and into ICE custody without ever leaving, by ICE simply filing the I-203, often along with a detainer. In fact, another email from Lehigh County to ICE once the agreement was underway said, “Inmate [] was given immediate parole on his Lehigh County case. If you would like to take custody of him, can you please forward me a 203?”¹⁷⁴

This appears to be a relatively common way that ICE utilizes detention agreements, including those created through USMS contracts.¹⁷⁵ A state court decision from as far back as 2008¹⁷⁶ described the exact same process in Palm Beach County, Florida, which at the time had a contract with the USMS that included ICE as an authorized user.¹⁷⁷ The jail in that case had a policy that if an I-247—a regular immigration detainer—was filed, an individual released on local charges would be held for 48 hours until ICE assumed custody, but if an I-203 was placed in the person’s file, the person was “considered to be in federal custody pending deportation proceedings” and “remains in jail as a federal detainee until ICE takes custody of the alien from the sheriff.”¹⁷⁸ The case made clear that ICE was not required to take physical custody as long as the I-203 was in that person’s file,¹⁷⁹ but the court

173. The 2008 and 2011 standards say that the form “must” accompany the detainee, and the 2000 and 2019 standards say that the form “shall” accompany the detainee. *2019 National Detention Standards for Non-Dedicated Facilities, 2.1 Admission and Release 19*, ICE (revised 2019) https://www.ice.gov/doclib/detention-standards/2019/2_1.pdf; *2011 Performance Based National Detention Standards, 2.1 Admission and Release 54*, ICE (Dec. 2, 2008, revised Dec. 2016) https://www.ice.gov/doclib/dro/detention-standards/pdf/admission_and_release.pdf; *2008 Performance Based Detention Standards, ICE/DRO Detention Standard: Admission and Release 7*, ICE (Dec. 2, 2008) https://www.ice.gov/doclib/dro/detention-standards/pdf/admission_and_release.pdf; *2000 National Detention Standard, INS Detention Standard: Admission and Release 5*, INS (Sept. 20, 2000) <https://www.ice.gov/doclib/dro/detention-standards/pdf/admiss.pdf>. Local jails with IGSAAs may also use I-203s for billing purposes. See Class Action Complaint, *Esparza v. Nobles Cty.*, No. 53-cv-18751 ¶ 9 (Minn. Dist. Ct. 5th Judicial District), https://www.aclu-mn.org/sites/default/files/nobles_class_action_complaint_final.pdf (“In conjunction with an IGSA, Form I-203 functions as documentation for billing purposes. . .”).

174. Partially redacted e-mail from Trina Rooney, Lehigh Cty. Jail Records ID Specialist, to ICE official (May 23, 2019) (on file with author). Lehigh abruptly stopped housing ICE detainees in 2019. Memorandum from Janine Donate, Dir. of Corrections, to ICE Field Office (Aug. 14, 2019) (on file with author).

175. See, e.g., *Order For Supplies or Services placed against USMS IGA 50-06-0023 in Bergen Cty., N.J.*, BERGEN CTY., NJ, <https://www.documentcloud.org/documents/4336509-IGSA-Contract-2013-Bergen-County-NJ.html>; *Order For Supplies or Services placed against USMS IGA 47-00-0079 in Cass Cty., Neb.*, CASS CTY., NE, <https://www.documentcloud.org/documents/1698194-cass-county-ne-usms-contract.html>; *Order For Supplies or Services placed against USMS IGA 38-08-0001 in Franklin Cty., Mass.*, FRANKLIN CTY., MA, <https://www.documentcloud.org/documents/1866634-franklin-county-ma-igsa-contract.html>.

176. *Ricketts v. Palm Beach Cty. Sheriff*, 985 So.2d 591 (Fla. Dist. Ct. App. 2008).

177. See Fla. Immigrant Coal. v. Mendez, No. 09-81280-CIV-MARRA, 2010 U.S. Dist. LEXIS 114726 at *6 (S.D. Fla. Oct. 27, 2010) (recounting the facts of the *Ricketts* case and noting that Palm Beach County had a USMS agreement at the time).

178. *Ricketts*, 985 So.2d at 592.

179. See *id.* (“With respect to appellant himself, if he had posted the \$ 1,000 [sic] bond on the state charges, then he would have been booked on the federal I-203, which Lieutenant Manley confirmed was

declined to rule on the legality of that system.¹⁸⁰ Similarly, the Vermont Department of Corrections, which has a USMS IGA authorizing ICE, seems to believe that “despite responding to a document entitled a ‘detainer,’ while holding an individual past their release date in the same cell of the same state facility run by the same state employees—the detainee is in fact held in ‘federal’ custody.”¹⁸¹

Although this practice appears to be somewhat routine, it actually violates the terms of most agreements. In *Esparza v. Nobles County*, a recent case challenging the use of detainers in Minnesota, the sheriff argued that because local inmates with detainers in their files were “rolled over” into ICE custody under the county’s IGSA with ICE, that no new seizure had ever occurred for Fourth Amendment purposes.¹⁸² That court rejected that argument in part by looking at the language of the IGSA and pointing out that the county’s practice was not authorized under that agreement, which stated that the jail could “‘only’ receive ICE detainees from ‘properly identified [ICE] personnel or other properly identified Federal law enforcement officials.’”¹⁸³ Unlike other cases where no seizure had occurred where ICE brought an individual in physical custody to a local facility,¹⁸⁴ when the transfer was from state to federal custody, it constituted a new arrest, which the court determined was not authorized by state law.¹⁸⁵

The language in the Nobles County agreement¹⁸⁶ was hardly an outlier. In fact, the vast majority of USMS agreements I reviewed contained form language under the heading “Receiving and Discharge of Federal Detainees” specifying procedures for booking, specifically that the local government will “accept as federal prisoners those persons committed by federal law enforcement officers for violations of federal law only upon presentation by the officer of proper law enforcement credentials,” and to release the detainee

in his file, and would continue to be held for pick-up by ICE agents. At that point, he would no longer be a state prisoner but a federal detainee.”)

180. Because the petitioner had not actually posted bond, and was not yet in federal custody, “he [could] not secure a determination of his federal status pursuant to the detainers in federal court.” *Id.* at 593. A few years later, a federal court dismissed a § 1983 case against the same jail alleging that its policy of preventing local inmates from posting bond if there was a detainer in their file as insufficiently “wide-spread.” See *Mendez*, 2010 U.S. Dist. LEXIS 114726, at *26-29.

181. Newbury, *supra* note 27, at 654-55.

182. *Esparza v. Nobles Cty.*, No. A18-2011, 2019 Minn. App. Unpub. LEXIS 932 at *12-13 (Minn. Ct. App., Sept. 23, 2019) (unpublished) (“[A]ppellants contend that they have avoided a new seizure of respondents because the housing contract ‘establish[es] ICE custody’ immediately.”).

183. *Id.* at 13.

184. *Id.*; see also Order Granting Summary Judgment and Entering Permanent Injunction, *Esparza v. Nobles Cty.*, Case No. 53-cv-18751 at *7 (Minn. Dist. Ct. Jan. 30, 2020), available at https://www.aclum.org/sites/default/files/field_documents/53-cv-18-751_order_for_sj_and_perm_injunction.pdf (comparing the Nobles County policy with *Abriq v. Metro. Gov’t of Nashville & Davidson Cty.*, 333 F. Supp. 3d 783 (M.D. Tenn. 2018), in which ICE brought a detainee to the county jail in its own custody).

185. *Esparza*, 2019 Minn. App. Unpub. LEXIS at *18 (granting permanent injunction).

186. While Nobles County had an IGSA with ICE directly, the language was substantially similar to the form language of most USMS IGAs.

only to the agency that had committed them.¹⁸⁷ The agreements therefore by their own terms prohibit local jails from transferring local detainees into ICE custody without an ICE officer appearing in person and presenting his or her credentials. That might seem like a needless formality, especially given the informal nature of communication between ICE and local governments and the treatment of detention as a business transaction in practice. Furthermore, ICE appears to actively encourage this practice, and local jails have a perverse economic incentive to go along with it.

However, the absence of that formality has serious legal implications. If a jail chooses to maintain custody of a local inmate after they would have been released without following the procedure described in the agreement, the local jail is complying in the detention of that person as a request only—essentially, honoring a detainer. Therefore, the failure to adhere to that procedure means that a local jail would be liable for detaining someone in violation of their rights the same way that that it would be liable for honoring a detainer that violated someone’s rights.¹⁸⁸ Just like in the Florida program, the procurement framing of these task orders does not change the fact that the local government is making a policy decision to voluntarily transfer its own local detainees into ICE custody.

Whether a local agency like a jail has authority to maintain custody of an inmate who would otherwise be released will vary by locality, but it is not created by the detention contract. For example, Susai Francis remained in the Suffolk County Correction Facility after his release from local custody, but the county argued that he was actually in ICE custody because his paperwork was “re-written” and he “was placed in a jail cell rented by ICE”¹⁸⁹ through its contract with the USMS.¹⁹⁰ The New York state court disagreed, holding that a change in custody constitutes a new arrest, and that there was no authority for local officials to make that arrest under state law.¹⁹¹ It did not address the possibility that local officers could conduct those arrests under

187. IGA between USMS and Lehigh Cty., Pa. (emphasis added) (on file with author). Some of the more recent IGAs changed the language slightly to say, “accept Federal detainees only upon presentation by a law enforcement officer of the Federal Government or a USMS designee with proper agency credentials.” See, e.g., IGA 27-00-0060 between Lake Cty., Ind. and USMS, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/indiana/lake_county_jail.pdf.

188. See *Galarza v. Szalcyck*, 745 F.3d 634,643 (3d Cir. 2014) (holding that detainers are requests only and that mandatory detainers would be “inconsistent with the anti-commandeering principle of the Tenth Amendment”); see also *Newbury*, *supra* note 27, at 672-73 (“Finding that the INA did not affirmatively authorize state or local officials to make civil immigration arrests without a formal 287(g) agreement, the *Lunn* court concluded that detainers constitute warrantless arrests requiring explicit state law authorization. . . . Assuming that an IGA does not convert local or state agents and holding cells into their federal counterparts for purposes of arrest, the *Lunn* ruling should apply to all states with legal codes similarly devoid of civil immigration arrest powers.”).

189. *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31, 35-36 (N.Y. App. Div. Nov. 14, 2018).

190. *Id.* at 49.

191. *Id.* at 53-54 (“While the Sheriff asserts that Francis was in the custody of ICE following his return to the correctional facility from the courthouse, we find that he was in the Sheriff’s custody until Francis was actually taken into custody by duly authorized ICE officers.”).

287(g) agreements because the county did not have one.¹⁹² Similarly, in a case where the Colorado District Court determined that no civil arrest authority existed under Colorado law, the sheriff had initially followed a policy he referred to as “IGSA holds.” Under this policy, the inmate was considered housed under the IGSA if ICE sent the jail detainer forms.¹⁹³ Local ordinances or settlement agreements may also prohibit specific jails from honoring detainers, which was in fact the situation in Nobles County.¹⁹⁴ By extension, using detention agreements as an alternative to detainers would logically violate those same settlement agreements and ordinances. In contrast, a sheriff’s decision to honor detainers was upheld in a situation where Texas passed a law requiring county cooperation with detainers.¹⁹⁵ Although it would be impossible to catalogue every variation on local authority here, it suffices to say that intergovernmental detention agreements on their own cannot create the authority to authorize local jails to make civil immigration arrests.¹⁹⁶

IV. NOT JUST CONTRACTS: THE ROLE OF LOCAL DEMOCRACY

While much of the history and structure of federal detention have conspired to view intergovernmental detention agreements as business transactions, there are influences at work other than money. Reframing detention contracts as policy decisions, in which local governments can and should be active participants, rather than passive providers of a purchased service, has significant advantages for community organizers seeking to end detention. Recent examples show that when local jails are subjected to public scrutiny and political accountability for their roles in ICE detention, even the economic payoff may not be worth the political cost.¹⁹⁷ However, USMS detention does not raise anywhere near the level of public outcry that ICE

192. *Id.* at 49.

193. After the case was filed, the sheriff changed the policy to require ICE to appear in person within 48 hours. *Cisneros v. Elder*, No. 18CV30549, 2018 Colo. Dist. LEXIS 3388, at *10 (D. Colo. Dec. 6, 2018).

194. *See Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 941 (D. Minn. 2017); Order Granting Summary Judgment and Entering Permanent Injunction, *Esparza v. Nobles Cty.*, No. 53-cv-18751, *supra* note 183, at *14 (citing *Orellana v. Nobles Cty.*, 230 F. Supp. 3d 934, 941 (D. Minn. 2017)). This was also the situation in Lehigh County, although the new policy did not result in litigation there, and Lehigh County stopped housing ICE detainees in 2019. *See Adopting a Resolution for the County of Lehigh to Clarify the Policy Regarding Detainers Issued Under 8 C.F.R. §287.7*, Res. No. 2014-36, Lehigh Cty. Bd. of Comm’rs (2014) (“[O]nce the subject of the detainer is not otherwise detained, the Lehigh County Department of Corrections shall release the subject of the detainer from County custody, unless the Lehigh County Department of Corrections receives a judicially-issued detainer, warrant or order.”); Settlement Agreement and Release, *Galarza v. Szalczyk*, No. 10-6815-JKG (E.D. Pa. June 3, 2014) (including the language of the new Lehigh County policy to not honor detainers); Donate, *supra* note 173.

195. *See City of El Cienzo v. Texas*, 890 F.3d 164, 185, 188 (5th Cir. 2018) (“Here the ICE-detainer mandate itself authorizes and requires state officers to carry out federal detention requests.”).

196. *See Newbury*, *supra* note 27, at 687 (reviewing applicable Vermont state law to conclude that “Vermont DOC agents who honor ICE detainer requests are making warrantless arrests that are likely unauthorized by law and in violation of Article 11 protections against unreasonable seizures. The DOC’s Intergovernmental Agreement to rent bed space to federal authorities is unlikely to remedy these shortcomings”).

197. *See infra* Section IV.A.

detention does. This means that although it is probably in ICE's interest to contract directly with a local government in order to negotiate its own terms and ensure its own interests, it may be in the local government's interest to utilize a preexisting USMS agreement, especially if ICE is only using the facility in a limited manner. Doing so avoids significant transaction costs, not only in terms of time and effort, but in terms of the political process. Therefore, simply pushing for increased transparency and public oversight of these agreements can change the cost-benefit analysis for local governments and make cooperation with ICE less attractive.

A. *Community Organizing Against ICE Detention*

Collaboration with ICE has been a flashpoint in state and local politics across the country. Given the national-level impasse on immigration policy, activists have been increasingly focusing their efforts locally, including on detention policy.¹⁹⁸ For instance, the Deerfield Correctional Facility in Ionia, Michigan, which had been empty since its closure in 2009, was about to be sold to a private prison company to become an ICE detention center in 2019 until Michigan's governor vetoed the sale as a result of organized political pressure.¹⁹⁹ On one hand, the economic benefit was clear, as the facility was projected to provide 225 jobs at an average salary of \$68,000,²⁰⁰ and the city of Ionia had "been a correctional community since the mid-1800s" with an economy that depended on prison revenue.²⁰¹ However, there was strong political resistance to the sale, both locally²⁰² and statewide.²⁰³ For example, Ionia's deputy mayor opposed the sale despite the economic benefit because he didn't want the town "to be known for the unfair treatment of incarcerating people simply because they are looking to improve their lot in life."²⁰⁴ The governor justified the decision on moral grounds, saying that the expansion of immigration detention "doesn't reflect our Michigan values."²⁰⁵

198. See Felipe De La Hoz, *How ICE is Using Private Contractors to Dodge Local Democracy*, THE APPEAL (May 26, 2020), <https://theappeal.org/politicalreport/ice-private-contractors-local-democracy/> ("In the face of congressional inaction on immigration, many immigrants' rights advocates have shifted their focus locally: to state, county, and municipal policymakers who can intervene directly in their jurisdictions to curtail ICE detention.").

199. Michael Gerstein, *Whitmer Halts Land Sale for \$35M Private Immigration Detention Center*, MICH. ADVANCE (Feb. 16, 2019), <https://www.michiganadvance.com/2019/02/16/breaking-whitmer-halts-land-sale-for-35m-private-immigrant-detention-center/>.

200. *Id.*

201. James Gemmill, *State Rep Fumes Over Gov. Whitmer's Block of Immigration-Detention Center*, FOX 17 W. MICH. (Feb. 16, 2019, 7:53 PM), <https://fox17online.com/2019/02/16/state-rep-fumes-over-gov-whitmers-block-of-immigration-detention-center/>.

202. Elisabeth Waldon, *Ionia City Council Hears Opposition to Illegal Immigrant Detention Center*, DAILY NEWS (Feb. 7, 2019), <https://thedailynews.cc/articles/ionia-city-council-hears-opposition-to-illegal-immigrant-detention-center/>.

203. See Paul Egan, *Whitmer Nixes Private Immigrant Detention Center Proposed in Ionia*, DETROIT FREE PRESS (Feb. 17, 2019, 4:40 PM), <https://www.freep.com/story/news/local/michigan/2019/02/17/gretchen-whitmer-private-immigration-prison-ionia/2898680002/> (describing the response of the state-wide advocacy group Michigan United, which had opposed the sale).

204. Gerstein, *supra* note 198 (quoting Ionia Deputy Mayor Kim Patrick).

205. *Id.* (quoting spokeswoman Tiffany Brown regarding the governor's decision).

In contrast, the pre-existence of USMS contracts reduces the transaction costs in terms of time and political capital that it would take to negotiate separate agreements. One county's representative with whom I spoke described the process of adding ICE as "a whole lotta' paperwork," but not especially controversial, and added that using the USMS agreement meant the county would not have to "jump through all the hoops" that they would otherwise need to go through.²⁰⁶ In short, USMS agreements allow local governments to skip the potentially contentious step of deciding whether to sign an agreement with ICE in the first place. The lack of expiration dates on the vast majority of USMS contracts also helps avoid politically contentious flashpoints. Because "the process of renewing a contract often offers the best window for addressing chronic problems at a facility or updating standards," the fact that USMS contracts generally do not need to be renewed eliminates an otherwise crucial window for policy change.²⁰⁷

Even where ICE detention and USMS detention occur in the same communities, USMS detention does not attract anywhere near the same amount of criticism. The West Detention Center in Contra Costa County, California came under constant fire in 2017 and 2018 for the jail's collaboration with ICE—housing around 200 detainees at a time during this period through its USMS contract.²⁰⁸ Sheriff Livingston was known for his cozy relationship with ICE, including posting release dates for local detainees online as a way to circumvent California's sanctuary laws.²⁰⁹ He was also known for rescinding the visitation privileges for CIVIC, an immigrant rights group, in retaliation for its work bringing detention conditions to light.²¹⁰ When CIVIC publicized reports of ICE's mistreatment of detainees in 2017,²¹¹ the allegations sparked extensive media coverage and convinced multiple elected officials to take a closer look at the facility, including through in-person visits.²¹² ICE was closely involved in these visits,²¹³ but the public scrutiny wore thin

206. Interview, *supra* note 157.

207. ALTMAN & SMALL, *supra* note 6, at 7.

208. The USMS contract with the county was signed in 2009; ICE was added in 2010. *IGA between Contra Costa Cty., CA and USMS*, U.S. MARSHALS SERV., https://www.usmarshals.gov/foia/IGAs_Cap_Agreements/california/contra_costa_county.pdf (last accessed Nov. 1, 2020).

209. Aaron Davis & Nate Gartell, *Experts Concerned Contra Costa Sheriff Tipping Off ICE by Posting Release Dates of Detained Immigrants*, E. BAY TIMES (Mar. 30, 2018, 3:45PM), <https://www.eastbaytimes.com/2018/03/29/experts-concerned-contra-costa-sheriff-tipping-off-ice-by-posting-release-dates-of-detained-immigrants/>.

210. Matthias Gafni, *Contra Costa Sheriff Bans ICE Detainee Advocacy Group from Visiting Jail. Nonprofit Calls it Retaliation*, E. BAY TIMES (Mar. 8, 2018, 6:45 AM), <https://www.eastbaytimes.com/2018/03/07/contra-costa-sheriff-bans-ice-detainee-advocacy-group-from-visiting-jail-nonprofit-calls-it-retaliation/>.

211. Otis R. Taylor, Jr., *Conditions Worsen for Some ICE Detainees at Richmond Jail*, S. F. CHRONICLE (Nov. 10, 2017, 11:26 AM), https://www.sfchronicle.com/news/article/Conditions-worsen-for-some-ICE-detainees-at-12346066.php?utm_campaign=sfgate&utm_source=article&utm_medium=http%253A%252F%252FContra-Costa-sheriff-investigating-complaints-by-12350162.php#photo-14507041.

212. Ted Golberg, *East Bay Congressman Wants Federal Probe of ICE Detainee Abuse Claims at Contra Costa Jail*, KQED (Nov. 29, 2017, 10:10AM), <https://www.kqed.org/news/11633375/east-bay-congressman-wants-federal-probe-of-ice-detainee-abuse-claims-at-contra-costa-jail>.

213. E-mail from David Livingston, Sheriff, to Erik Bonnar, ICE Field Off. Dir. (Mar. 21, 2018) (on file with author) ("Before approving this request I wanted to check with you[.] What is ICE's position, if

on the jail and the county supervisors.²¹⁴ In one email from March 2018, Sheriff Livingston complained to ICE that, “[t]hese tours are getting to be a drain on our limited jail staff and are starting to disrupt operations.”²¹⁵ A few months later, the sheriff announced his decision to stop detaining immigrants for ICE.²¹⁶ Although the county stopped housing ICE detainees, it did not actually end the USMS agreement, and the jail continues to house USMS detainees.²¹⁷

Similarly, Santa Ana City, California announced a decision in 2017 to phase out its IGSA with ICE as a result of a campaign by local community groups. Once the city announced its decision, ICE moved to cancel the agreement immediately.²¹⁸ The city, which still owed \$21 million on its last jail construction project, decided to expand its USMS population to make up for the lost revenue.²¹⁹ The decision was framed in economic terms, as the city’s interim manager conceded: “We thought we were going to be operating at such a big deficit when the ICE contract left, and so we were eager to move into the next use as quickly as possible.”²²⁰ Although it doesn’t appear that the city currently houses ICE detainees under its USMS contract,²²¹ the comparable silence that followed the announcement of the expanded USMS contract is telling. Even while these two communities stopped detaining immigrants for ICE, the continuing use and existence of their USMS IGAs means that a future local administration could quickly restart the collaboration.²²² However, there is reason to be just as morally outraged about USMS

any, on us facilitating another visit for Harris’ staff?”); see E-mail from Richard Chang, Assistant ICE Field Off. Dir., to Susan Lyon, Exec. Assistant to Sheriff (Nov. 16, 2017) (following up on a visit request from Senator Harris’s office and saying “We would like to make ourselves available if/when a tour does occur”) (on file with author).

214. Aaron Davis, *Contra Costa Sheriff to Announce End of ICE Contract, Sources Say*, E. BAY TIMES (July 10, 2018, 7:28 AM), <https://www.eastbaytimes.com/2018/07/09/contra-costa-sheriff-to-announce-end-of-ice-contract-sources-say/> (“Richmond Mayor Tom Butt said he has heard some reports that the Board of Supervisors and the sheriff’s office were working on an agreement to end the contract . . .”).

215. E-mail from David Livingston, Sheriff, to Erik Bonnar, ICE Field Office Dir. (Mar. 21, 2018) (on file with author).

216. *Id.*

217. According to my public records request, the facility still housed between zero and thirteen USMS detainees per day between September 2019 and February 2020. Additionally, I requested the agreement and all modifications currently in effect, and the county’s response included both the USMS IGA and the 2010 modification making ICE an authorized user. E-mail from Dennis Kahane, Special Assistant to the Sheriff, Contra Costa Cty., to author (Mar. 26, 2020) (on file with author).

218. See Jill Replogle, *Santa Ana Rents More Jail Beds to US Marshals After ICE Cancels Contract*, S. CAL. PUB. RADIO (Aug. 7, 2017), <https://www.scpr.org/news/2017/08/07/74385/santa-ana-narrows-budget-gap-left-by-canceled-ice/>; see also Chacon, *supra* note 88, at 1375-76 (contrasting Santa Ana’s response to national immigration enforcement policy with other entities in Orange County, California).

219. See Replogle, *supra* note 217.

220. *See id.*

221. *ICE Feb. 2020 Data*, *supra* note 10.

222. There is also the potential that ending local ICE detention agreements will not reduce detention overall, but instead concentrate it in rural and conservative counties, further isolating detainees from their support systems. Ryo & Peacock, *supra* note 86, at 66. Another emerging trend is that when local governments end detention contracts, ICE adapts by cutting local governments out of the agreement altogether and negotiating directly with the private companies that were previously subcontractors. De La Hoz, *supra* note 197. While those concerns should not be lightly set aside, assuming that detention will happen

detention as ICE detention, given that USMS detention features similar racial disparities, negligent medical care, unacceptable living conditions, and family hardship.²²³

B. *The Power and Impact of Local Transparency*

These examples also suggest an additional angle for local advocacy based on procedure and federalism principles. As Erin Ryan writes in her overview of intergovernmental negotiation, “[b]argaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for,” but “[b]argaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine innovation, and frustrate problem solving is not consistent with federalism values. . . .”²²⁴ Put another way, for intergovernmental agreements to be legitimate methods of policymaking within a federalist system, they need to have guarantees of procedural fairness, and especially of local input through the democratic process. But ICE detention through USMS contracts, to an even greater extent than directly negotiated IGSA, frequently involves no participation or innovation at all. Instead, local governments largely decide to take or leave boilerplate USMS agreements based solely on the per diem rate, which is negotiated not through community input, but through algorithms that are produced by the eIGA system and potentially subcontracted to consultants like Summerill.

Additionally, for any agreement to be legitimate, “we must be confident that the agents involved in the bargaining process are faithfully representing the interests of the principals on whose behalf they are negotiating:” in this case, the local citizens.²²⁵ In the context of detention contracting, however, one of the primary interests of local sheriffs—to fill beds in their jails and earn federal money—may be fundamentally opposed to the interests of the community members and their families who will ultimately bear the costs of that detention.²²⁶ In order to legitimize the negotiation process, those community members should be given input. The best way to ensure that the community is given that voice is by subjecting the negotiation process to the same democratic transparency and accountability that any local policy would require. The examples above show that when this occurs, the local officials

elsewhere still allows the local government in question to escape political accountability for participating in it.

223. Freed Wessler, *supra* note 57.

224. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 113-14 (2011).

225. *Id.* at 106.

226. Even short-term detention can have devastating emotional and financial consequences for detainees’ families. Cf. Julia Preston, *The True Costs of Deportation*, MARSHALL PROJECT (June 18, 2020, 7:00 AM), <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation> (describing the devastating impact of deportation on the families left behind).

with authority often reach a very different conclusion about whether a detention contract is in the local interest.

Advocacy for increased transparency and accountability in these agreements can attract unlikely allies. McHenry County, Illinois, had an atypically robust public debate about whether to renew the county's detention agreement with the USMS that shows both the power of transparency to impact the local political process, and the risks of relying too heavily on economic arguments to persuade elected officials. In 2013, Summerill made a sales pitch to county officials, calculating that the county was losing \$46 per detainee per day on its USMS contract, and prison officials couldn't provide a clear answer to the public about whether that was true.²²⁷ This brought together an unusual confluence of stakeholders concerned about the human cost of McHenry County's role in ICE detention²²⁸ and fiscally conservative constituents worried about money²²⁹ and transparency.²³⁰ The county convinced USMS to raise the per diem rate by \$10 in May 2014, but the USMS pulled its detainees from the county immediately after.²³¹ But ICE actually used the USMS agreement with McHenry more than the USMS did, and continued to house detainees there at the higher rate.²³² This example shows that while transparency can help build coalitions, activists should be cautious about relying too heavily on economic arguments, which can further entrench the commodification of detention.

In sum, though, there is much to be said for pushing for transparency for its own sake. This is particularly important for ICE detention occurring through USMS contracts, which on the local level appears partially motivated by a desire to decrease political costs. The very act of opening these governmental processes up to public oversight raises these costs for counties and changes the calculus of whether such an agreement is worthwhile. It also forces local governments to treat detention as a policy decision, rather than a procurement transaction. This narrative shift makes it easier to have a conversation about the moral implications of a local community's role in detention, and to change the narrative from one of dollars to one of people.

227. McDougall, *supra* note 118.

228. See Chelsea McDougall, *For One McHenry County Detainee, Life Inside an Immigration Detention Center is Filled with Heartbreak, Fear, and Despair*, NW. HERALD (Dec. 29, 2014), <https://www.nwherald.com/2014/12/26/for-one-mchenry-county-detainee-life-inside-an-immigration-detention-center-is-filled-with-heartbreak-fear-and-despair/as5rr6r/>.

229. McDougall, *supra* note 118.

230. See Cal Skinner, *County Board to Vote on ICE Jail Contract with No Taxpayer Input; Any Cost-Benefit Study Hidden*, MCHENRY CTY. BLOG (May 5, 2014), <http://mchenrycountyblog.com/2014/05/05/county-board-to-vote-on-ice-contract-with-no-taxpayer-input-any-cost-benefit-study-hidden/> (criticizing the fact that "this major contract did not go through the Finance & Audit Committee" and suggesting that taxpayers ask, "why the secrecy? why the hurry?").

231. Chelsea McDougall, *McHenry County Jail Bed-Rental Program with Immigration, U.S. Marshals, May Hit Breaking Point*, NW. HERALD (Dec. 30, 2014), <https://www.nwherald.com/2014/12/24/mchenry-county-jail-bed-rental-program-with-immigration-u-s-marshals-may-hit-breaking-point/a2c6gld/>.

232. *Id.*; *ICE Data Feb. 2020*, *supra* note 10. In FY 2020 so far, ICE houses on average 258 detainees in McHenry County Jail under this agreement.

V. CONCLUSION

This overview of the legal framework of ICE detention through USMS contracts shows that these agreements exist in a murky legal area, ostensibly authorized by overlapping agreements between agencies, governments, and contractors. In practice, it is characterized by informal negotiations that take place out of public view. In a single county jail, the local government may have an agreement with the USMS that authorizes the INS—which continues in effect pursuant to the OFDT’s interagency agreement with ICE—but the jail negotiates with ICE through the eIGA system, and perhaps also subcontracts the negotiation process to a private consultant, and manages day-to-day detention through Basic Ordering Agreements, and completes self-inspections for ICE or reports to an inspections subcontractor. Each of the links in this dizzying web of contracts is framed as a business transaction.

This multi-layered process has real implications for the democratic legitimacy of these agreements. The legitimacy of a law is a function of the process that created it,²³³ and here, those processes are fundamentally flawed. At their best, intergovernmental negotiations safeguard the core federalism objectives of “checks and balances, accountability and transparency, local innovation, and problem-solving synergy.” They provide a dynamic space for two levels of government to define the details of federal-state cooperation on an agreement-by-agreement basis.²³⁴ As a prerequisite for achieving those objectives, though, the negotiating process itself must be fair, accountable, and transparent.²³⁵

The process described in this Note is a far cry from that best-case scenario. The negotiating process is informal, secretive, and bureaucratic, preventing the public from engaging with or even understanding the process. The procurement framing of detention contracts leads officials on both levels to see themselves as completing transactions, rather than setting policy, which obfuscates responsibility for the results of those agreements and removes them from the arena of political accountability. This is especially problematic when we remember, as these contracts often seem to forget, that we are talking about the power to lock people up. The variety of views on incarceration aside, it is uncontroversial to say that such a power is not legitimate unless it stems from a legitimate process. But instead of being subject to two layers of democratic accountability, the agreements examined in this Note are buried under multiple layers of bureaucracy, further obscuring the human lives they impact.

233. *See id.* at 63 (“It is a truism to say that laws gain their legitimacy, at least in part, from the structures that produce them.”).

234. Ryan, *supra* note 223, at 12.

235. *See id.* at 5 (“Procedural consistency with fair bargaining and federalism principles yields instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone.”).

To the extent that local and federal governments can agree to cooperate for detention purposes, they should have to do so in a publicly accountable and transparent way, and within the limits of their legal authority. The current process has allowed both levels of government to push, and sometimes exceed, the limits of what they are allowed to do under these contracts, and it diffuses political responsibility for their actions. Requiring intergovernmental agreements to comply with democratic norms of transparency and political accountability is not a mere formality; it shifts the public and governmental understanding of these agreements from being a technocratic procurement contract that local governments can take or leave, to a choice of policy that local governments support with their cooperation. Understanding the agreements in this way forces local governments to consider detention not just as a matter of money, but also as one of policy and people.