

EMPATHY IN THE DIGITAL ADMINISTRATIVE STATE

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ABSTRACT

Humans make mistakes. Humans make mistakes especially while filling out tax returns, benefit applications, and other government forms, which are often tainted with complex language, requirements, and short deadlines. However, the unique human feature of forgiving these mistakes is disappearing with the digitalization of government services and the automation of government decision-making. While the role of empathy has long been controversial in law, empathic measures have helped public authorities balance administrative values with citizens' needs and deliver fair and legitimate decisions. The empathy of public servants has been particularly important for vulnerable citizens (for example, disabled individuals, seniors, and underrepresented minorities). When empathy is threatened in the digital administrative state, vulnerable citizens are at risk of not being able to exercise their rights because they cannot engage with digital bureaucracy.

This Article argues that empathy, which in this context is the ability to relate to others and understand a situation from multiple perspectives, is a key value of administrative law deserving of legal protection in the digital administrative state. Empathy can contribute to the advancement of procedural due process, the promotion of equal treatment, and the legitimacy of automation. The concept of administrative empathy does not aim to create arrays of exceptions, nor imbue law with emotions and individualized justice. Instead, this

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concept suggests avenues for humanizing digital government and automated decision-making through a more complete understanding of citizens' needs. This Article explores the role of empathy in the digital administrative state at two levels: First, it argues that empathy can be a partial response to some of the shortcomings of digital bureaucracy. At this level, administrative empathy acknowledges that citizens have different skills and needs, and this requires the redesign of pre-filled application forms, government platforms, algorithms, as well as assistance. Second, empathy should also operate ex post as a humanizing measure which can help ensure that administrative mistakes made in good faith can be forgiven under limited circumstances, and vulnerable individuals are given second chances to exercise their rights.

Drawing on comparative examples of empathic measures employed in the United States, the Netherlands, Estonia, and France, this Article's contribution is twofold: first, it offers an interdisciplinary reflection on the role of empathy in administrative law and public administration for the digital age, and second, it operationalizes the concept of administrative empathy. These goals combine to advance the position of vulnerable citizens in the administrative state.

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“[I]f anyone says any of the following . . . that she’s oppressed and they feel her pain . . .

[I]f anyone tells her she’s responsible for them being unemployed . . .

[I]f anyone tells her she doesn’t belong here and when are you leaving?

. . .

[Y]ou’ve really suffered, Yazz says, I feel sorry for you, not in a patronizing way, it’s empathy, actually”¹

INTRODUCTION

To err is human.² To forgive used to be human, too. However, the digitalization of public services and automation of administrative decision-making are eroding the empathic nature of the administrative state.³ Existing explicit or implicit semblances of empathy, the

1. BERNARDINE EVARISTO, *GIRL, WOMAN, OTHER* 60 (2019).

2. See ALEXANDER POPE, *AN ESSAY ON CRITICISM* (1711), <https://www.poetryfoundation.org/articles/69379/an-essay-on-criticism> [<https://perma.cc/7RUJ-JD26>] (“To err is human; to forgive, divine.”).

3. The concept of the administrative state draws on U.S. legal scholarship, but it is used in this Article to refer more generally to a country where there is a transfer of powers from legislators to government. As a result, most key decisions are made by public authorities. See generally Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 371 (1989) (advancing “a preliminary theory of modern legislation” that “characterizes legislation as a series of directives issued by the legislature to government-implementation mechanisms, primarily administrative agencies”). On the impact of technology on the administrative state, see Cary Coglianese, *Administrative Law in the Automated State*, 150 DAEDALUS 104, 105, 113 (2021) (arguing that automation of the administrative state may outperform existing systems, but it also dehumanizes it); see also Thomas M. Vogl, Cathrine Seidelin, Bharat Ganesh & Jonathan Bright, *Smart Technology and the Emergence of Algorithmic Bureaucracy: Artificial Intelligence in UK Local Authorities*, 80 PUB. ADMIN. REV. 946, 947 (arguing that algorithms change the nature of bureaucracy and explaining that the roles of public administrators are now

cognitive process which allows people to understand a situation from someone else's perspective, are vanishing with mass-scale optimization of government services and automated decision-making.⁴ Administrative law frameworks, which were designed for analog bureaucratic systems where the risk of abuse lurked, do not fit the characteristics of digital government and automated decision-making.⁵ In the digital administrative state, decision-making power has not only been primarily transferred to public authorities (the administrative state), it has also been intermediated by technology through the use of online platforms, smartphone applications, digital identities, the digitization of information, the use of algorithms, big data, and different applications of artificial intelligence ("AI").⁶ When digital technology is used as an intermediary for rights, law is often automatically applied without any room for empathy, regardless of the circumstances experienced by citizens.⁷ This disproportionately affects

imbricated with that of computational algorithms). *See generally* Mireille Hildebrandt, *Law as Information in the Era of Data-Driven Agency*, 79 MOD. L. REV. 1 (2016) (arguing for a collaboration between lawyers and computer scientists in light of the proliferation of data-driven agencies).

4. *See, e.g.*, Madalina Busuioc, *Accountable Artificial Intelligence: Holding Algorithms to Account*, 81 PUB. ADMIN. REV. 825, 826 (2021) ("Tremendous technological advances brought on by data, computation, and the growing power of machine pattern recognition . . . have led to the ubiquity of artificial intelligence algorithms in structuring technological but also human interactions."); Emre Bayamlioglu, *Contesting Automated Decisions: A View of Transparency Implications*, 4 EUR. DATA PROT. L. REV. 433, 434 (2018) ("[A]pproaches to transparency are rooted in the concern that as automated systems amass more data from an expanding array of sources, we end up delegating more power to machines to decide where and how we live, what we consume, how we communicate, how we are entertained, healed, and so on."). *See generally* Noortje de Boer & Nadine Raaphorst, *Automation and Discretion: Explaining the Effect of Automation on How Street-Level Bureaucrats Enforce*, PUB. MGMT. REV., June 7, 2021, at 1 (showing that automation only decreases discretion as currently perceived and arguing for moving beyond this concept). For a broader public administration analysis of the implications of the use of digital technology in administrative decision-making, see generally Marc Bovens & Stavros Zouridis, *From Street-Level Bureaucrat to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control*, 62 PUB. ADMIN. REV. 174 (2002).

5. Coglianese, *supra* note 3.

6. The implications of digitization on constitutional law have been more thoroughly studied than those on administrative law. However, the digital administrative state is part of this broader phenomenon. *See* Giovanni De Gregorio, *The Rise of Digital Constitutionalism in the European Union*, 19 INT'L J. CONST. L. 41, 57 (2021) ("This situation also concerns the relationship between online platforms and public actors. Governments and public administrations usually rely on big tech companies, for example[,] to offer new public services or improve their quality through digital and automated solutions.").

7. *Id.* at 113.

vulnerable citizens who are the most prone to erring and also those who, before the automation of government, benefited from the occasional empathy of street-level bureaucrats toward first-time mistakes and oversights.⁸

Vulnerability is an elusive concept, as it is simultaneously universal and particular.⁹ Vulnerability before the government refers to both permanent disabilities (for example, blindness) and temporary but taxing circumstances (for example, extreme poverty or scarcity of essential resources) that affect citizens' ability to fully engage with bureaucracy.¹⁰ Vulnerability includes old age, documented and undocumented disabilities, low literacy, limited digital skills, tragic life

8. Robin West, *The Anti-Empathic Turn*, in *PASSIONS AND EMOTIONS: NOMOS* LIII 243, 246 (James E. Fleming ed., 2013) (“Excellent judging requires empathic excellence. Empathic understanding is, in some measure, an acquired skill, as well as, in part, a natural ability. Some people do it well, some, not so well.”). For cognitive aspects surrounding empathy, see generally Anna Spain Bradley, *Cognitive Competence in Executive-Branch Decision Making*, 49 *CONN. L. REV.* 713 (2017). On empathic decisions issued by street-level bureaucrats and differences in their application, see generally Ming H. Chen, *Where You Stand Depends on Where You Sit: Bureaucratic Politics in Federal Workplace Agencies Serving Undocumented Workers*, 33 *BERKELEY J. EMP. & LAB. L.* 227 (2012). Street-level bureaucrats, including social welfare caseworkers, have been depicted negatively in the public imaginary, and much of human bureaucracy has been criticized in the literature for its lack of adaptability and the incomprehension and hostility of its public servants. For a review of the literature and reflection on the interaction between government and the public, see generally BERNARDO ZACKA, *WHEN THE STATE MEETS THE STREET* (2017) (discussing the complex moral decisions made by street-level bureaucrats).

9. Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11 *INT’L J. CONST. L.* 1056, 1058 (2013) (“A central paradox of vulnerability is that it is both universal and particular. Both of these features arise in the first place from our embodiment: as embodied beings we are all vulnerable, but we experience this vulnerability uniquely through our individual bodies.” (footnote omitted)).

10. See Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* 20 *YALE J.L. & FEMINISM* 1, 1, 12–18 (2008) (exploring the concept of vulnerability as a condition that can be temporary and affect every individual both on a permanent or temporary basis. Vulnerability is defined here as “universal and constant” and “inherent in the human condition”). On the impact of scarcity of time, financial means, and food on decision-making, see generally SENDHIL MULLAINATHAN & ELДАР SHAFIR, *SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH* (2013).

events, and other cognitive limitations.¹¹ If to err is human, so is it to be vulnerable.¹²

This Article argues that empathy in government is not only a key value of administrative law, but it is also a necessary condition for the operationalization of justice, evidence-based adjudication, and democracy in the digital administrative state.¹³ This Article advances

11. See Kat MacFarlane, *Disability Without Documentation*, 90 *FORDHAM L. REV.* 59, 59 (2021) (arguing for a documentation-free model “that accepts an individual’s assessment of their disability and defers to their accommodation preferences”); Lucy A. Jewel, *The Biology of Inequality*, 95 *DENV. L. REV.* 609, 610 (2018) (explaining that social outcomes are also influenced by “living in stressful disadvantaged environments with little social security and control over one’s individual circumstances”); Daniel H. Lende, *Poverty Poisons the Brain*, 36 *ANNALS ANTHROPOLOGICAL PRAC.* 183, 183 (2012) (introducing a critical understanding of how lower socioeconomic status influences health, intelligence, and academic success in a way that transcends the simplistic cause-effect approach); MICHAEL M. MARMOT, *STATUS SYNDROME* 1–2, 6 (2004) (arguing that disadvantaged people live shorter lives and suffer from worse mental and physical health than more advantaged individuals); SENDHIL MULLAINATHAN & ELДАР SHAFIR, *SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES* 7, 12–13 (2013) (explaining how scarcity can capture a person’s mindset and alter their behavior by pinning their focus on what they feel is missing from their lives).

12. Fineman, *supra* note 10, at 8.

13. Other authors have recognized the important role of empathy in achieving justice. See ANTHONY M. CLOHESY, *POLITICS OF EMPATHY* 1 (2013) (“[E]mpathy, that capacity of the imagination that resides in everyone, is a necessary condition for justice, democracy and ethics, a necessary condition for us to live well in the world.”); John Deigh, *Empathy, Justice, and Jurisprudence*, 49 *S.J. PHIL.* 73, 79 (2011) (“Sound interpretation of law . . . requires empathy. And when a law is interpreted without empathy for those whose interests it affects, when it is instead applied on the basis of a ‘strict’ reading, then the outcome is as likely as not to be grossly unjust.”); Maksymilian Del Mar, *Imagining by Feeling: A Case for Compassion in Legal Reasoning*, 13 *INT’L J.L. CONTEXT* 143, 153, 156 (2017) (arguing that compassion can help judges understand better the position of defendants and that “imagining by feeling” is not a threat to the rule of law but a condition of it); Coglianese, *supra* note 3, at 114–15 (“[T]he way that government treats members of the public affects their sense of legitimacy in the outcomes they receive. To build public trust in an automated state, government authorities will need to ensure that members of the public still feel a human connection.”); Thomas B. Colby, *In Defense of Judicial Empathy*, 96 *MINN. L. REV.* 1944, 1947 (2012) (arguing that a judge “can neither craft nor employ legal doctrine competently if she is not willing and able to understand the perspectives of, and the burdens upon, all of the parties”); West, *supra* note 8, at 245–46 (“And, adjudication does proceed largely, albeit not entirely, by analogy. For that reason alone, some level of empathic ability, one might think, is a requisite of any judging in a common-law or case-method system that’s worthy of the name. Excellent judging requires empathic excellence.”). *But see* Brenner Fissell, *Modern Critiques of Judicial Empathy: A Revised Intellectual History*, 2016 *MICH. ST. L. REV.* 817, 834–35 (“If any affective faculties are allowed to enter in, this makes the adjudicator’s ‘heart’ a new source from which law is derived. This brings in unauthorized, democratically illegitimate, and particularistic—often elitist—considerations into law, which . . . also brings in a potential for inconsistency . . .”). For a discussion of the multiple debates on the definition of empathy, particularly in the field of psychology where most studies on empathy have been conducted, see Sara H. Konrath, Edward H. O’Brien & Courtney Hsing, *Changes in Dispositional Empathy in*

the novel concept of administrative empathy, which consists of the duty of public authorities to gather multiple perspectives about citizens' needs and ensure that the interactions between citizens and government remain meaningful and inclusive in the digital administrative state. I do not suggest that empathy should create room for individualized justice or regular exceptions.¹⁴ Instead, empathy should operate at two levels to advance the legitimacy of government.¹⁵ First, empathy should play a role *ex ante*, before administrative adjudication takes place, in the decision of whether to automate public services and in the design of digital government. This can ensure that government platforms are accessible, inclusive, and understanding of the different needs of the citizenry.¹⁶ Vulnerable citizens are not only affected by the opacity of automated decision-making, but they are also at risk of not applying for the benefits to which they are entitled, making more administrative mistakes, missing deadlines, or being profiled as fraudsters due to their inability to engage with digital government.¹⁷

Second, empathy should operate *ex post*, after an administrative adjudication takes place, when citizens make mistakes and fail to exercise their rights. As an *ex post* measure, administrative empathy should require public authorities and, under more limited conditions, courts and administrative tribunals deciding on appeals, to gather

American College Students Over Time: A Meta-Analysis, 15 PERSONALITY & SOC. PSYCH. REV. 180, 181 (2011).

14. For a thorough analysis of the balance between general and individualized justice in administrative law, see generally Jefferey M. Sellers, *Regulatory Values and the Exceptions Process*, 93 YALE L.J. 938 (1983).

15. On digital government and legitimacy, see generally Ryan Calo & Danielle K. Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 EMORY L.J. 797 (2021) (offering a thorough analysis of the legitimacy deficit in the automation of government).

16. See Tiago Carneiro Peixoto, Kai Kaiser & Huong Thi Lan Tran, *Digital Government: Minding the Empathy Gap*, WORLD BANK BLOGS (Jan. 30, 2020), <https://blogs.worldbank.org/governance/digital-government-minding-empathy-gap> [<https://perma.cc/8F3H-BR5R>] (arguing that to “deliver digital services that truly add value to their users, [governments] will have to start paying significantly more attention to user research . . . [by] adopt[ing] a ‘users’ needs’ first approach . . . [and] focus[ing] on the number of users who get services that are faster, cheaper[,] and more efficient”).

17. See Sofia Ranchordás, *Connected but Still Excluded? Digital Exclusion Beyond Internet Access*, in THE CAMBRIDGE HANDBOOK OF INFORMATION TECHNOLOGY, LIFE SCIENCES AND HUMAN RIGHTS (Marcello Ienca, Oreste Pollicino, Laura Liguori, Elisa Stefanini & Roberto Adorno eds., forthcoming 2022) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3675360 [<https://perma.cc/6GNZ-2X4D>] (arguing that digital inequality denies vulnerable citizens adequate access to the digital government).

additional information on all relevant perspectives that may have been ignored in earlier stages by an automated system or that can be attributed to deficient engagement with digital technology. This can help guarantee that vulnerable citizens are not excluded from exercising their rights because they were unable to engage critically with digital government. This Article argues that administrative empathy can contribute to materially advancing procedural due process, equal treatment, and the legitimacy of the administrative state in governments immersed in efficiency narratives.

This Article's key arguments are particularly relevant in light of two recent scandals in the United States and the Netherlands that showcase how the automated application of administrative law is not only unfair to vulnerable citizens, but also produces inaccurate results. Researchers found the Michigan Integrated Data Automated System ("MiDAS"), which aims to flag unemployment fraud, was more likely to interpret small mistakes as signs of fraud than a human decision-maker, netting a 93 percent error rate.¹⁸ This high error rate meant that thousands of Michiganders unjustly did not receive unemployment benefits.¹⁹ Similarly, in the Netherlands from 2011 to 2021, twenty-six thousand Dutch families were mistakenly labeled as fraudsters by sets of algorithms used by the tax authorities.²⁰ In this scandal, which ultimately led to the resignation of the government in January 2021, public authorities reacted without any empathy to simple oversights or mistakes, such as failure to report small income changes, with severe sanctions, including fines to repay all received benefits with interest within a short time period.²¹

18. Paul Egan, *Michigan Integrated Data Automated System Experiences 93 Percent Error Rate During Nearly Two Years of Operation*, GOVTECH (July 31, 2017), <https://www.govtech.com/data/michigan-integrated-data-automated-system-experiences-93-percent-error-rate-during-nearly-two-years-of-operation.html> [<https://perma.cc/REA8-BC8H>].

19. *Id.*

20. See Jon Henley, *Dutch Government Faces Collapse over Child Benefits Scandal*, GUARDIAN (Jan. 14, 2021, 6:29 AM), <https://www.theguardian.com/world/2021/jan/14/dutch-government-faces-collapse-over-child-benefits-scandal> [<https://perma.cc/RBX8-LWYE>] (“[M]ore than 20,000 working families [were] pursued for fraud before the courts, ordered to repay child support benefits[,] and denied the right to appeal over several years from 2012.”).

21. This scandal gave rise to many personal tragedies. Citizens fell victims to a witch hunt, were ignored by tax authorities when trying to prove innocence, and were systematically ignored by Dutch courts when appealing. See Senay Boztas, *The Childcare Benefits Scandal: Voices of the Victims*, DUTCHNEWS (Jan. 15, 2021), <https://www.dutchnews.nl/news/2021/01/the-childcare-benefits-scandal-voices-of-the-victims> [<https://perma.cc/9HN9-R8KX>]. As one mother reported,

This Article acknowledges that the role of empathy in law is controversial, as empathic assessments may be associated with emotions rather than with rationality.²² Nevertheless, two decades of literature on compassion, empathy, and the rule of law have demonstrated that empathy cannot be reduced to emotions.²³ This Article does not do so either. Instead, it reflects on the significance of empathy in administrative law, and it provides concrete suggestions on how to operationalize empathy in the digital administrative state.²⁴ It

[T]he effects were devastating. “My total debt was €92,000, I went into a debt relief programme, was called a fraudster. I was isolated, I didn’t work for two years, I had to have psychiatric help and my youngest daughter threatened to commit suicide,” she says . . .

. . . She had bailiffs at the door trying to take her son’s car, she says, she was penalised because her son used his study grants to help her pay the rent, and her story charts more than a decade of “mental abuse” – from her own government.

Id.; see also Anna Holligan, *Dutch PM Rutte Government Resigns over Child Welfare Fraud Scandal*, BBC NEWS (Jan. 15, 2021), <https://www.bbc.com/news/world-europe-55674146> [<https://perma.cc/DM6J-B82M>] (“Parents were branded fraudsters over minor errors such as missing signatures on paperwork, and erroneously forced to pay back tens of thousands of euros given by the government to offset the cost of childcare, with no means of redress. They were . . . ‘steamrolled’ by the system.”). See generally CHILD CARE ALLOWANCE PARLIAMENTARY INQUIRY COMM., ONGEKEND ONRECHT [UNPRECEDENTED INJUSTICE] (2020) [hereinafter UNPRECEDENTED INJUSTICE], https://www.houseofrepresentatives.nl/sites/default/files/atoms/files/verslag_pok_definitief-en-gb.docx.pdf [<https://perma.cc/D32Z-QRRB>] (reporting the parliamentary investigation of the case).

22. CLOHESY, *supra* note 13 (“[E]mpathy . . . is a necessary condition for justice [and] democracy However, as we look at the world in the early years of the twenty-first century, we witness our efforts to imagine what it is like to be someone else thwarted by hate, resentment[,] and suspicion.”).

23. Mariglynn Edlins, *Developing a Model of Empathy for Public Administration*, 43 ADMIN. THEORY & PRACTICE 22, 23, 25 (2021) (exploring the concept of empathy within public administration and articulating a method of incorporating empathy into public service in a way that improves the experience of both the empathy-giver and the empathy-receiver); see Stephanie Dolamore, *Detecting Empathy in Public Organizations: Creating a More Relational Public Administration*, 43 ADMIN. THEORY & PRACTICE 58, 58 (2021) (critiquing the absence of tools that support the assessment of empathy in public organizations and offering a framework to detect an organizational culture of empathy). On the importance of emotions and the exploration of empathy as a cognitive process, see generally MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* (2001).

24. There is a wealth of scholarship on compassion, law, and empathy in the law. See generally Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the “Heart” of Lawyering*, 87 NEB. L. REV. 1 (2008) (arguing that the “heart” of lawyering is understanding clients and exercising sympathy, and that law schools do not adequately instruct on these skills); Shariisse O’Carroll, *Empathy, Courage and Diligence: Three Things I Wish I’d Learned in My Law School Ethics Course*, 17 PROF. LAW. 24, 24 (2006) (reflecting that while empathy is often not taught in law school, it may be “the most essential qualification for practicing law”); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLINICAL L. REV. 135 (2002) (encouraging

draws on decades of administrative law and public administration scholarship, which have consistently argued that empathy is an important administrative value and a condition to regulatory excellence.²⁵

clinical legal educators to ensure that students recognize the role of empathic communication by discussing and interpreting emotional experiences in working with clients); V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002) (noting the importance of client-centered and client-empowering skills like listening in clinical legal education, particularly in the context of domestic violence cases); William D. Casebeer, *Identity, Culture and Stories: Empathy and the War on Terrorism*, 9 MINN. J.L. SCI. & TECH. 653 (2008) (discussing how counter-terrorism strategies would benefit from narrative considerations of terrorists' stories and the culture of which they are a part); Claire A. Hill, *Introduction to the Symposium: Self and Other: Cognitive Perspectives on Trust, Empathy and the Self*, 9 MINN. J.L. SCI. & TECH. 637 (2008) (discussing how an empathy-conscious framework denotes a descriptive and cognitive account of people's decision-making, as opposed to explanations for irrationalities or mistakes); Richard Warner, *Empathy and Compassion*, 9 MINN. J.L. SCI. & TECH. 813 (2008) (arguing that individuals lack sufficient understanding and knowledge of how others feel); Marc D. Falkoff, *Conspiracy To Commit Poetry: Empathetic Lawyering at Guantanamo Bay*, 6 SEATTLE J. FOR SOC. JUST. 3 (2007) (noting that poems written by prisoners at Guantanamo Bay offered opportunities for empathy and humanized the detainees, and that otherwise, such insights would have been absent in their habeas corpus cases); Amnon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 J. LEGAL EDUC. 296, 297 (2006) (proposing that literature be invoked more regularly as a law school teaching tool not "to make[] readers judge empathetically," but to teach students "to withhold judgment so that when judgment is ultimately rendered it is more profound and meaningful"); Jody Lynee Madeira, *Recognizing Odysseus' Scar: Reconceptualizing Pain and Its Empathic Role in Civil Adjudication*, 34 FLA. ST. U. L. REV. 41 (2006) (arguing for a framework that considers how the expression of pain influences interpersonal dimensions of personal injury cases); Jody Lynee Madeira, *Regarding Pained Sympathy and Sympathy Pains: Reason, Morality, and Empathy in the Civil Adjudication of Pain*, 58 S.C. L. REV. 415 (2006) (critiquing personal injury litigation's overemphasis on the objective, as opposed to the subjective, and considering how empathic jurors' responses can be both reasoned and moral); Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557 (2004) (arguing that disproportionate sentencing of African-American defendants to death hinges on an "empathic divide" between white jurors and Black defendants); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203 (2004) (discussing the empathy and heroism paradigm as motivations for public defenders, particularly the assertion that the more a defender identifies with a client, the longer she will last).

25. See CARY COGLIANESE, LISTENING, LEARNING, AND LEADING: A FRAMEWORK FOR REGULATORY EXCELLENCE 85 (2015), <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreport.pdf> [<https://perma.cc/U3HZ-YD52>] (discussing the core attributes of regulatory excellence, which involves "demonstrating empathy and building trust across all segments of society, showing respect, and treating people with dignity even when making decisions that adversely affect their interests"); Dolamore, *supra* note 23 ("Empathy . . . is a prosocial behavior that improves interactions and brings outcomes in line with important public service values." (citation omitted)); Lisa A. Zanetti, *Cultivating and Sustaining Empathy as a Normative Value in Public Administration*, in GOVERNMENT IS US 2.0, at 76, 84 (Cheryl Simrell

This Article, though not strictly comparative, draws thus on examples from different jurisdictions (the United States, Estonia, France, and the Netherlands) which are at comparable stages of economic development, digitalization, and automation.²⁶ Despite the many differences between these countries, vulnerable citizens in these Western jurisdictions tend to experience similar problems with automation: limited digital literacy, racial biases, and profiling that disregards individual challenges.²⁷ These examples aim to not only compare the resemblances between these countries, but also to contrast the different national legal measures to better flesh out the concept of administrative empathy. While both vulnerability and empathy are fundamentally human, the role of public authorities and courts in the practical exercise of empathy for the protection of vulnerable citizens is viewed differently across the jurisdictions under analysis (for example, with reluctance in France).²⁸

This Article proceeds in four parts. Part I provides a brief overview of the challenges faced by vulnerable citizens in the digital administrative state. It also explains why digitalization and automation exacerbate longstanding problems such as bureaucratic hurdles, red tape, and mistrust of government.

King ed., 2011) (“Public servants function as the mediators . . . between the citizens and their elected representatives—and the reverse. They are in a unique position to perpetuate the status quo, or maneuver toward change. They can be the active sustainers of empathy as a normative value in public administration.”).

26. The country selection is based on the 2020 United Nations E-Government Survey where Estonia, the Netherlands, and the United States were ranked within the top countries with the most developed digital government service delivery. See U.N. DEP’T OF ECON. & SOC. AFFS., UNITED NATIONS E-GOVERNMENT SURVEY 2020: DIGITAL GOVERNMENT IN THE DECADE OF ACTION FOR SUSTAINABLE DEVELOPMENT, at xxv, U.N. Doc. ST/ESA/PAD/SER.E/214, U.N. Sales No. E.20.II.H.1 (2020) [hereinafter U.N. E-GOVERNMENT SURVEY 2020].

27. For an analysis of the central issues of the digital administrative state in France, see generally Jean-Bernard Auby, *Le droit administratif face aux défis du numérique* [Administrative Law and Digital Challenges], 15 ACTUALITE JURIDIQUE DROIT ADMINISTRATIF [LEGAL NEWS ON ADMINISTRATIVE LAW] 835 (2018).

28. Cedric Meurant, *La bienveillance du juge administratif à l’égard des parties* [The Kindness of Administrative Judges with Regard to the Parties], in 111 LA BIENVEILLANCE EN DROIT PUBLIC [KINDNESS IN PUBLIC LAW] 113, 113–14 (Mare & Martin eds., 2020) (“[D]ans le système juridique français, le juge doit se borner à trancher le litige défini par les parties Le juge n’est effectivement que la ‘bouche’ du droit et La bienveillance du juge ne devrait donc pas exister.”) [“In the legal French system, the judge must limit herself to the dispute as defined by the parties The judge is effectively only the “mouth” that speaks the law The kindness of the judge should not exist.”].

Part II considers the general role of empathy in law and public administration, reviewing existing literature and case law on empathic legal interpretation and judicial lawmaking.

Part III analyzes two recent comparative examples which illustrate the gradual disappearance of empathy in the digital administrative state: the Dutch Childcare Benefits and MiDAS scandals. This analysis focuses on social benefits because this area has been heavily digitized and automated in most Western countries to control the eligibility of applicants and detect fraud. Moreover, social benefits illustrate well the dehumanization of government, the stigmatization of poverty, and the disappearance of room for empathy in the digital administrative state.²⁹

Part IV explores the concept of administrative vulnerability and offers concrete suggestions for its implementation, including the duty to forgive excusable mistakes, limited but significant revisions of administrative procedures, channels for additional information and assistance to vulnerable citizens, and the redesign of digital government for greater user-friendliness. This Part draws inspiration from different recent legislative, judicial, and institutional measures adopted in Estonia, the Netherlands, and France.

As a concept, administrative empathy does not aim to rehumanize the digital administrative state, particularly at a time when empirical

29. As Philip Alston notes in the *Report of the Special Rapporteur on Extreme Poverty and Human Rights*,

[A]s humankind moves, perhaps inexorably, towards the digital welfare future, it needs to alter course significantly and rapidly to avoid stumbling, zombie-like, into a digital welfare dystopia. Such a future would be one in which unrestricted data-matching is used to expose and punish the slightest irregularities in the record of welfare beneficiaries (while assiduously avoiding such measures in relation to the well-off) . . .

Philip Alston, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶ 77, U.N. Doc. A/74/493 (Oct. 11, 2019); see also Ed Pilkington, *Digital Dystopia: How Algorithms Punish the Poor*, GUARDIAN, <https://www.theguardian.com/technology/2019/oct/14/automating-poverty-algorithms-punish-poor> [https://perma.cc/N3WJ-ZWAG] (last updated Oct. 14, 2019, 3:25 PM) (“Vast sums are being spent by governments across the industrialized and developing worlds on automating poverty and in the process, turning the needs of vulnerable citizens into numbers, replacing the judgment of human caseworkers with the cold, bloodless decision-making of machines.”); Brief by the United Nations Special Rapporteur on Extreme Poverty and Human Rights as *Amicus Curiae* Supporting Respondent, RBDHA 5 februari 2020, c/09/550982/HA ZA 18/388 (NJCM c.s./De Staat der Nederlanden) (Neth.), <https://www.ohchr.org/Documents/Issues/Poverty/Amicusfinalversionsigned.pdf> [https://perma.cc/BP4J-S74W] (“[T]he Special Rapporteur has been looking into the implications of the increasing use of digital technologies in welfare states on the protection of the human rights of the poorest in society. . . . [S]evere human rights problems . . . emerge when welfare states turn into ‘digital welfare states’ . . .”).

evidence suggests that humans are becoming less empathic than previous generations and humans in the loop do not take meaningful actions.³⁰ Rather, administrative empathy aims to help rethink the design of bureaucracy in the digital administrative state and expose the limitative role of vulnerabilities on citizens' abilities to exercise their rights.

I. BUREAUCRACY, THE DIGITAL ADMINISTRATIVE STATE, AND VULNERABLE CITIZENS

In the last decades, government has become increasingly digital. However, digital tools are not a panacea for all citizens, and automation can add a new layer of bureaucracy to an already complex system, exacerbating well-known problems of the administrative system.³¹ This Part first introduces those challenges and then explains the central paradoxes of the digital administrative state. This Part delves into the specific problems of the digital administrative state, explaining why vulnerable citizens are being left behind, are more prone to making administrative mistakes with important legal consequences—including denial of benefits, profiling as fraudsters, receipt of sanctions—and face great difficulty in exercising their rights.

A. *The Weight of Bureaucracy*

1. *Introduction.* Administrative law is often associated with the work of agencies typically located in the executive branch of a government that are delegated the day-to-day governance of the most important sectors of the economy (for example, telecommunications, internet, securities, agriculture, consumer protection).³² However,

30. See Konrath et al., *supra* note 13, at 180 (“Temporal changes in empathy might help explain certain interpersonal and societal trends that suggest people today are not as empathic as previous generations.”).

31. See Emile Marzolf, *Des pistes pour aider les plus vulnérables face à la dématérialisation du service public* [Some Leads To Help the Most Vulnerable with Regard to the Dematerialization of Public Services], ACTEURS PUBLICS [PUBLIC ACTORS], <https://acteurspublics.fr/articles/des-pistes-pour-aider-les-plus-vulnerables-face-a-la-dematerialisation-du-service-public> [<https://perma.cc/5XHQ-N58R>] (last updated Oct. 14, 2021, 4:05 PM) (summarizing the findings of a report by the L’Observatoire de l’éthique publique, which pointed out that digital government amounts to double layers of bureaucracy for the most vulnerable citizens in France, namely immigrants, minors, and citizens on welfare).

32. See generally WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW (Matthew Bender & Co. 6th ed. 2012) (discussing the key functions of U.S. administrative law).

historically, the core functions of administrative law included the organization of public authorities and their bureaucracies, prevention of abuses of power by public authorities, and the protection of individual rights.³³ France regards this field of law as a separate and distinct set of rules and courts, which are not primarily designed to protect citizens against public authorities, but rather to convey rules on how to organize government.³⁴ In French administrative law, public authorities are traditionally empowered to take all necessary measures to pursue the public interest, under strict guarantees that all citizens are treated equally and neutrally.³⁵ The German model of administrative law, which is particularly influential and incorporated throughout continental Europe, emerged later and emphasized the protection of citizens' rights before government.³⁶ Contrary to many jurisdictions on each side of the Atlantic, the U.S. model of administrative law is not directly based on the French or German

33. See Marshall E. Dimock, *Administrative Law and Bureaucracy*, 292 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 57–59 (1954) (explaining the functions of administrative law). See generally Francesca Bignami, *Comparative Administrative Law*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 145 (Mauro Bussani & Ugo Mattei eds., Cambridge Univ. Press 2012).

34. On the difference between the French approach to administrative law and common law, including a modern discussion of A. V. Dicey's work on French administrative law, see Mark D. Walters, *Public Law and Ordinary Legal Method: Revisiting Dicey's Approach to Droit Administratif*, 66 U. TORONTO L.J. (SPECIAL ISSUE: PUBLIC LAW FOR THE TWENTY-FIRST CENTURY) 53, 54, 67–68 (2016); see also Caroline Expert-Foulquier, *Is French Administrative Justice a Problem-Solving Justice?*, 14 UTRECHT L. REV. (SPECIAL ISSUE: PROBLEM-SOLVING JUSTICE: EUROPEAN APPROACHES) 40, 40–43 (2019) (discussing the approach of French public authorities and courts to problem solving). For the first well-known and influential account of French administrative law in English and how it compares to common law, see generally A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (Macmillan & Co. 8th ed. 1915). For an overview of the French administrative law system from a comparative perspective, see generally L. NEVILLE BROWN & JOHN S. BELL, FRENCH ADMINISTRATIVE LAW (Clarendon Press 5th ed. 1998) (describing the central aspects of the French administrative law system).

35. Bignami, *supra* note 33, at 152.

36. See Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1281 (1994) (“The German public law system focuses mainly on the protection of individual rights against the state, rather than on the oversight of executive processes.”); Moshe Cohen-Eliya & Iddo Porat, *The Administrative Origins of Constitutional Rights and Global Constitutionalism*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 103, 113 (Vicki C. Jackson & Mark Tushnet eds., Cambridge Univ. Press, 2017) (“The German model of administrative law . . . has been probably the most influential in Europe (it was incorporated in Austria, Portugal, Sweden, Finland, the Czech Republic, Poland, Spain, Switzerland, . . . and Estonia).”).

models.³⁷ Nevertheless, this Article addresses concerns that are shared by all these administrative legal systems: the weight of bureaucracy on vulnerable populations; the conflict between regulating abstract administrative values and accounting for individual needs; and safeguarding the human character of administrative law in the digital administrative state.³⁸ The underlying functions of each system, the role of the judiciary, and perceptions regarding good administration and good governance are important to understand a system's willingness to incorporate notions of empathy.³⁹

Despite the well-known criticisms of bureaucracy and the negative emotions they evoke in citizens, the incomprehensibility of rulemaking and public administration is accepted as a given.⁴⁰ This problem was popularized in Franz Kafka's work, *The Trial*, where citizens are presented as victims of the so-called "tyranny of distance."⁴¹ This blind conviction of public authorities to follow burdensome rules without

37. See Rose-Ackerman, *supra* note 36 ("Germany and the United States diverge sharply . . . in the external constraints they impose on high-level bureaucrats.").

38. Cf. Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EUR. J. INT'L L. 187, 211 (2006) ("There is a degree of wilful blindness . . . in the belief that increased doses of Western-style bureaucracy or due process procedures necessarily benefit citizens; to the contrary, the adjudicative methods dear to economic liberals are designedly biased to benefit those who can afford to use them . . .").

39. Cf. O. P. Dwivedi, *On Common Good and Good Governance: An Alternative Approach*, in BETTER GOVERNANCE AND PUBLIC POLICY: CAPACITY BUILDING FOR DEMOCRATIC RENEWAL IN AFRICA 35, 43 (Dele Olowu & Soumana Sako eds., Kumarian Press, Inc. 2002) ("Recognition of the moral dimension of governance raises concern for improving the conduct of public service and government And yet that moral tone is only one of several prerequisites of good governance. A broader list of values includes: (a) *Democratic* . . . values—equality, empathy, and tolerance for cultural diversity . . .").

40. See WENDY WAGNER & WILL WALKER, *INCOMPREHENSIBLE! A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT* 3 (Cambridge Univ. Press 2019) (critiquing the deliberate complexity of legal systems and information deluge while offering solutions for reform); see also Fabian Hattke, David Hensel & Janne Kalucza, *Emotional Responses to Bureaucratic Red Tape*, 80 PUB. ADMIN. REV. 53, 59 (2019) ("[A]dministrative delays and burdens cause negative emotions, especially confusion, frustration, and anger.").

41. See Darren McCabe, *The Tyranny of Distance: Kafka and the Problem of Distance in Bureaucratic Organizations*, 22 ORGANIZATION 58, 75 (2015) ("Kafka's insights are unsettling because they force us to look again at the violence that we do to others through bureaucratic mechanisms."). Kafka suggests bureaucrats who are the most removed from everyday challenges—"strategists, executives, directors[,] and senior managers"—are responsible for the creation of incomprehensible staples of bureaucracy, giving "instructions without apparent concern for others." *Id.* at 63. In *The Trial*, the whipper explains that he will not be put off carrying out his duties: "I am here to whip people, and whip them I shall." FRANZ KAFKA, *THE TRIAL* 107 (Willa Muir, Edwin Muir & E. M. Butler trans., Alfred A. Knopf, Inc. 1936).

regard for their impact on citizens and the need to account for the weight of bureaucracy on citizens' lives are some of the paradoxes of modern administrative law.

Nevertheless, bureaucracy cannot be fully set aside: "mass democracy requires bureaucracies" that establish rules and procedures for the functioning of government and exercising of rights.⁴² "[W]ithout elaborate and durable forms of administration, effective regulation, and sophisticated legal systems, political representation and legal equality cannot be realized."⁴³ In the administrative state, public authorities rarely come across as forgiving in the public imagination, even though administrative law inherently requires a balance between the abstract regulation of rights and accounting for specific citizens' needs.⁴⁴ The weight of bureaucracy has a negative impact on citizens' trust in government, and the promise of digital government to solve it is yet to be fully realized.⁴⁵

2. *Social Welfare and Bureaucracy.* Government assistance programs are some of the most bureaucratic systems in Western countries.⁴⁶ Welfare statutes are partly vague because the different needs for social assistance are difficult to pin down without a case-by-case approach.⁴⁷ Bureaucratic requirements to gain access to these programs, including eligibility criteria and verification guidance, can be

42. See Wendy Nelson Espeland, *Bureaucratizing Democracy, Democratizing Bureaucracy*, 25 LAW & SOC. INQUIRY 1077, 1080 (2000); MAX WEBER, *ECONOMY AND SOCIETY* 990–91 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Univ. of Cal. Press 1978).

43. Espeland, *supra* note 42.

44. See Andrew Wroe, *Economic Insecurity and Political Trust in the United States*, 44 AM. POL. RSCH. 131, 140 (2016) (arguing that economically insecure individuals harbor lower levels of political trust because the government is blamed for failing at its expected role).

45. According to the Pew Research Center, only 2 percent of individuals in the U.S. trust the federal government to do what is right "just about always," while 18 percent trust the federal government "most of the time." *Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RSCH. CTR. (Sept. 14, 2020) [hereinafter *Americans' Views of Government*], <https://pewrsr.ch/3mkh3Mt> [<https://perma.cc/H9D8-BYJ7>]; see also *Public Trust in Government: 1958–2021*, PEW RSCH. CTR. (May 17, 2021), <http://pewrsr.ch/1LuV5uS> [<https://perma.cc/2XV6-ZS8D>] (showing decreasing levels of trust since the Johnson administration with temporary but short-lived increases at the end of the Clinton administration).

46. See JOEL F. HANDLER & YEHESKEL HASENFELD, *The Welfare Bureaucracy*, in *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 186, 235–36 (Joel F. Handler & Yehekel Hasenfeld eds., Cambridge Univ. Press 2006) ("[W]elfare departments . . . are characterized by strong bureaucratic inertia.").

47. Joel F. Handler & Ellen Jane Hollingsworth, *Reforming Welfare: The Constraints of the Bureaucracy and the Clients*, 118 U. PA. L. REV. 1167, 1173 (1970).

surprisingly formal and precise.⁴⁸ While the original idea of social security and other social allowances was to alleviate poverty, promote solidarity, and support disfavored groups by conferring a right to government support, bureaucratic systems are in practice not designed or implemented for those purposes.⁴⁹ They are rooted in narratives which have fueled more demanding eligibility criteria, more aggressive anti-fraud policies, the stigmatization of recipients, and the creation of adversarial systems.⁵⁰ However, these programs' desired beneficiaries are among the most vulnerable in our societies and very often those who have limited resources to navigate bureaucracies.⁵¹

For example, in the United States, the veterans' benefit system has been criticized for imposing onerous requirements without regard for the applicants' situation, incurring long adjudication delays, and offering substandard judicial protection.⁵² In principle, military welfare is designed to protect veterans, as they are resilient subjects and

48. *See id.* at 1187.

49. *See* Gráinne McKeever, *Social Citizenship and Social Security Fraud in the UK and Australia*, 46 *SOC. POL'Y & ADMIN.* 465, 465 (2012) (discussing how social security fraud legislation in the United Kingdom and Australia reinforce the exclusion of claimants who have been suspected or convicted of minor social security fraud).

50. The stigmatization of welfare recipients has been well discussed in the literature with particular attention devoted to the public perception of women in the system. For a historical overview, see generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* (Routledge 3d ed. 2018); Alec Pemberton, *Discipline and Pacification in the Modern Administrative State: The Case of Social Welfare Fraud*, 17 *J. SOCIO. & SOC. WELFARE* 125 (1990); Dorothy E. Chunn & Shelley A. M. Gavigan, *Welfare Law, Welfare Fraud, and the Moral Regulation of the 'Never Deserving' Poor*, 13 *SOC. & LEGAL STUD.* 219 (2004); Ben Baumberg Geiger, *False Beliefs and the Perceived Deservingness of Social Security Benefit Claimants*, in *THE SOCIAL LEGITIMACY OF TARGETED WELFARE: ATTITUDES OF WELFARE DESERVINGNESS* 73 (Wim van Oorschot et al. eds., Edward Elgar Publishing 2017).

51. *See* Handler & Hollingsworth, *supra* note 47, at 1175 ("Most recipients are passive, dependent, and interested primarily in stability."); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 *MICH. L. REV.* 2099, 2116–17 (1989) (discussing the concept of empathy in social policy and social justice, and the relationship between empathy and the rule of law); Damon Dunn, *Welfare Programs Promote Bureaucracy Rather than Self-Sufficiency*, PAC. RSCH. INST. (Feb. 27, 2019), <https://www.pacificresearch.org/welfare-programs-promote-bureaucracy-rather-than-self-sufficiency> [<https://perma.cc/9LAJ-LPEG>] ("We have created a massive, cumbersome bureaucracy to administer an ineffective welfare state . . .").

52. *See* Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 *SMU L. REV.* 277, 277 (2019); *see also* Michael Serota and Michelle Singer, *Veterans' Benefits and Due Process*, 90 *NEB. L. REV.* 388, 391 (2011) (arguing that the long-drawn delays in adjudicating claims for disability benefits deprive veterans of the fair adjudication to which they are entitled).

“deserving citizens.” Yet, in practice, there are many paradoxes and obstacles in this system; when veterans find themselves injured and denied benefits, the system can be surprisingly hard to navigate.⁵³ This is particularly true regarding access to mental health services and disability benefits.⁵⁴ Interestingly, the United States designed its veterans benefits system to be nonadversarial, protecting veterans in a paternalistic way and isolating them from other administrative law systems.⁵⁵ Nonetheless, when the system fails, veterans are left with limited judicial protection.⁵⁶

The legal formality used to determine eligibility criteria for social welfare benefits has been criticized for decades as an example of indifferent and impersonal communication with citizens. In the 1980s, Professor Herbert Simon offered this critique with regard to eligibility criteria of the Aid to Families with Dependent Children (“AFDC”) program, which burdened applicants with gathering documentation from multiple bureaucracies.⁵⁷ Because of mutual misunderstandings between clients and caseworkers, many individuals will fail to jump through the necessary ‘bureaucratic hoops’ to obtain assistance.⁵⁸

B. *Digital Government and Automation*

Digital technology has become a double-edged sword for administrative law and bureaucracy. This subpart explains why digital

53. See Brianne P. Gallagher, *Burdens of Proof: Veteran Frauds, PTSD Pussies, and the Spectre of the Welfare Queen*, 2 CRITICAL MIL. STUD. 139, 139 (2016) (arguing that the bureaucratic impediments of the military complex and the U.S. administration have a debilitating impact on soldiers and veterans who seek mental health services and disability benefits).

54. See *id.* at 140–42.

55. See Jennifer D. Oliva, *Representing Veterans*, 73 SMU L. REV. 103, 106, 115 (2020).

56. See McClean, *supra* note 52 (criticizing the lack of an adversarial process and arguing that “without adversarial processes to compliment the veteran-friendly rules, the [Department of Veteran Affairs] model relegates disabled veterans to a substandard process for adjudicating disability benefits”); see also Michael P. Allen, *The United States Court of Appeals for Veterans Claims at Twenty: A Proposal for a Legislative Commission To Consider Its Future*, 58 CATH. U. L. REV. 361, 364–65 (2009) (stressing the need for review of the veterans’ benefits determinations and the Veterans Court’s role by a commission that would include representatives of all relevant constituencies).

57. William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1221 (1983) (“[The administrative reforms] have reduced [the claimants’] experience of trust and personal care and have increased their experience of bewilderment and opacity.”).

58. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1589 (1987); see also Simon, *supra* note 57 (discussing the bureaucratic hurdles faced by welfare recipients).

technology has become an additional layer of bureaucracy for vulnerable citizens.

1. *Digitalization and Automation.* Digitalization and automation are increasingly pervasive in government services in the United States and Europe.⁵⁹ The public sector followed a trend the private sector started that has fundamentally changed society.⁶⁰ In transportation, agriculture, tax, social welfare, telecommunication, market surveillance, and many other sectors, public authorities rely on digital technology to determine the eligibility of citizens for benefits, grant licenses, issue payments, adjudicate claims, and issue rules.⁶¹

The term “automated systems” refers to different information technologies designed either to “produce measurements or assessments” regarding a particular case, or “to make an administrative decision in lieu of a civil servant.”⁶² While some areas of decision-making, such as tax systems, are being automated thanks to machine learning, a subset of AI, a large number of public services rely on the simpler AI-applications.⁶³

59. See AI NOW INST., *LITIGATING ALGORITHMS: CHALLENGING GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS* 3 (2018), <https://ainowinstitute.org/litigatingalgorithms.pdf> [<https://perma.cc/4UDD-QSKT>] (examining U.S. cases “where algorithmic decision making has been central to the rights and liberties at issue in the case”); see also U.N. E-GOVERNMENT SURVEY 2020, *supra* note 26, at 12 (listing the fourteen countries with the most developed e-governments or digital governments, the majority of which are located in Europe).

60. See, e.g., Hannah Bloch-Wehba, *Automation in Moderation*, 53 CORNELL INT’L L.J. 41, 74–89 (2020) (criticizing the use of automation in online content moderation because it thwarts personal freedoms and creates new monetization and surveillance opportunities for platforms).

61. Coglianese, *supra* note 3, at 107–08 (listing several ways that “public authorities across the United States have already made considerable strides toward an increasingly automated government”). On e-enforcement and the use of digital technology for market surveillance, see generally Caroline Cauffman & Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, EUR. J. RISK REGUL. 1 (2021) (explaining the terms and framework of the Digital Services Act); Maria Lillà Montagnani, *Virtues and Perils of Algorithmic Enforcement and Content Regulation in the EU – A Toolkit for a Balanced Algorithmic Copyright Enforcement*, 11 CASE W. RES. J.L. TECH. & INTERNET 1 (2020) (discussing algorithmic enforcement in the digital single market strategy in Europe and examining its implications on algorithmic copyright enforcement).

62. Makoto Hong Cheng & Hui Choon Kuen, *Towards a Digital Government*, 31 SING. ACAD. L.J. 875, 878 (2019).

63. See, e.g., Bart Verheij, *Artificial Intelligence as Law*, 28 A.I. & L. 181, 186 (2020) (illustrating how the Dutch tax system draws on “expert knowledge of tax law and it applies that legal expertise to your specific situation. True, this is largely good old-fashioned AI already scientifically understood in the 1970s, but by its access to relevant databases of the interconnected-big-data kind, it certainly has a modern twist”).

Digital technologies promise to make government more agile, efficient, and effective, thus enhancing the legitimacy of the administrative state.⁶⁴ Digital technology also has the potential to enable the design of tailored interventions. For example, Louisiana's Department of Health uses Supplemental Nutrition Assistance Program enrollment data to register its citizens for health benefits and to enroll thousands of citizens for Medicaid without a separate application process.⁶⁵ However, in most cases, governments design their automated decision-making systems for standardization as this is more cost-effective and more likely to promote consistency and objectivity.⁶⁶ Administrative agencies do not always question the need to digitize and automate every single process, its legitimacy, and the overall cost of technology to citizens' rights.⁶⁷ Thus, the central issue around the automation and digitalization of government becomes how to do it properly while minimizing any harms which may negatively impact access to justice and the equal treatment of vulnerable citizens.⁶⁸

2. *Vulnerable Citizens and the Digital Administrative State.* While digital technology enhanced the overall quality of government services for the majority of citizens, it ushered in a key challenge of digital governance: ensuring that citizens without access to the internet or

64. Beth Simone Noveck, *The Innovative State*, 150 DAEDALUS 121, 121, 123 (2021) (discussing the use of data-analytical approaches to the optimization of government and the need for new approaches and training of public servants).

65. *Id.* at 126; see *Louisiana Receives Approval for Unique Strategy To Enroll SNAP Beneficiaries in Expanded Medicaid Coverage*, LA. DEP'T OF HEALTH (June 1, 2016), <https://ldh.la.gov/index.cfm/newsroom/detail/3838> [<https://perma.cc/93Q2-WZTV>] ("If Medicaid can enroll 50 percent of targeted SNAP individuals who would otherwise complete a full application for Medicaid expansion, the reduction in eligibility man hours to enroll 52,500 individuals would be about 52,626 hours, saving [Louisiana] over \$1.5M in estimated pay . . . in addition to any associated administrative costs.").

66. See generally Dominique Hogan-Doran, *Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making*, 13 JUD. REV. 345 (2017) (discussing the growing use of automation in the public sector and its legal implications).

67. See Calo & Citron, *supra* note 15, at 804 ("At some point, the trend toward throwing away expertise, discretion, and flexibility with both hands strains the very rationale for creating and maintaining an administrative state.").

68. For a profound analysis of the design of new technologies for government and governance, see Deirdre K. Mulligan & Kenneth A Bamberger, *Saving Governance-by-Design*, 106 CALIF. L. REV. 697, 704 (2018) ("[O]utlin[ing] a plan to equip the administrative state to wield design as a tool of governance, while at the same time future-proofing democratic norms of policymaking and substantive values as regulated activities recede into technical designs.").

without digital skills are not left behind.⁶⁹ Besides the ever-present problem of burdensome and incomprehensible bureaucracy,⁷⁰ the exclusion of vulnerable citizens in the digital administrative state is also explained by the unequal access to technology or inability to engage with it, and the discriminatory design of automated systems.⁷¹

The study of administrative law and public administration assumes—and rightly so—that government–citizen relationships are inevitably asymmetric and unequal.⁷² In the case of welfare benefits, citizens in need can only resort to the government and to courts if their applications are denied. Ultimately, they are dependent on a governmental decision for a service which does not come with alternative providers. With the pervasiveness of digital government, new and deeper inequalities are emerging as citizens are increasingly required to be self-reliant, to apply for a growing number of public services online, and to have sufficient resources to understand how government platforms work and what data automated systems may use against or in their favor to decide their applications. Nevertheless, the United Nations, the Pew Research Center, and literature from different disciplines have warned that millions of citizens in Western countries—including 7 percent of the United States’ population—remain offline or cannot engage critically with government websites and the internet in general.⁷³ Little is known about the legal position of

69. See Arnaud Bertrand & Julie McQueen, *How Can Digital Government Connect Citizens Without Leaving the Disconnected Behind?*, ERNST & YOUNG (Feb. 24, 2021), https://www.ey.com/en_gl/government-public-sector/how-can-digital-government-connect-citizens-without-leaving-the-disconnected-behind [https://perma.cc/2D4T-AHQQ] (“The challenge for government is to harness data and technology to become more efficient and effective, without disadvantaged groups being left further behind.”).

70. See *supra* Part I.A.

71. For a general analysis of these two aspects in the context of tax law, see generally Sofia Ranchordás & Luisa Scarcella, *Automated Government for Vulnerable Citizens: Intermediating Rights*, 30 WM. & MARY BILL RTS. J. (forthcoming 2022), https://pure.rug.nl/ws/portalfiles/portal/183216257/SSRN_id3938032.pdf [https://perma.cc/E93L-69DJ].

72. This assumption justifies the growing relevance of reason-giving in administrative law. See Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reason*, 61 DUKE L.J. 1811, 1821 (2012) (presenting reason-giving as an important accountability mechanism and empowerment instrument for citizens).

73. Andrew Perrin & Sara Atske, *7% of Americans Don’t Use the Internet. Who Are They?*, PEW RSCH. CTR. (APR. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-don-t-use-the-internet-who-are-they> [https://perma.cc/ZJJ6-R4Y6] (explaining results of an early 2021 survey linking internet non-adoption to age, education, and household income); see also Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact->

vulnerable citizens, but a brief overview of scholarly research can help elucidate that the number of vulnerable citizens is higher than the one estimated by governments, which tends to be limited to citizens with proven disabilities.⁷⁴

Vulnerability is an elusive and highly complex concept.⁷⁵ Vulnerability can be permanent in the case of certain disabilities, such as irreversible blindness, or temporary, such as the death of a loved one. However, it can also be caused by physical, cognitive, social, or economic factors.⁷⁶ In the digital age, the lack of digital capital, as defined as the ability to critically engage with online communities, can limit individuals' abilities to perceive and interpret information, placing them at risk of embracing misinformation and not understanding the technology needed for government services.⁷⁷ There are vulnerabilities which are inherent to an individual (for example, a physical disability) and others that are situational (for example, citizens becoming prone to make mistakes because welfare application forms use complex language or involve mastery of novel technologies).⁷⁸

Digital government and automated government decisions can give rise to forms of situational vulnerability. Governments digitize services for the "liberal legal subject," a fully functioning, autonomous, and independent adult who can easily engage with novel government

tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption [https://perma.cc/GM68-7TCR] (suggesting that broadband adoption and smartphone ownership have not reduced the inequality between Americans with lower and higher incomes).

74. See generally MacFarlane, *supra* note 11 (offering a critique of the documentation of disability in the context of the lack of access to affordable healthcare and arguing that disability is poorly understood).

75. Peroni & Timmer, *supra* note 9.

76. *Id.* On the concept of vulnerability and the diversity of sources of vulnerability as lack of self-reliance, that is, the inability to apply for essential public services, such as benefits, without assistance, see generally Wilma Numans, Tine Van Regenmortel, René Schalk & Juliette Boog, *Vulnerable Persons in Society: An Insider's Perspective*, INT'L J. QUALITATIVE STUD. ON HEALTH & WELL-BEING, Dec. 28, 2021, at 1.

77. For more information on the importance of digital capital in the context of digital inequalities, see Massimo Ragnedda, *Conceptualizing Digital Capital*, 35 TELEMATICS & INFORMATICS 2366, 2367 (2018) (defining digital capital as "the accumulation of digital competencies (information, communication, safety, content-creation[,] and problem-solving), and digital technology").

78. See NATALI HELBERGER, ORLA LYNSKEY, HANS-W. MICKLITZ, PETER ROTT, MARIJN SAX & JOANNA STRYCHARZ, EU CONSUMER PROTECTION 2.0: STRUCTURAL ASYMMETRIES IN DIGITAL CONSUMER MARKETS 16–19 (2021), https://www.beuc.eu/publications/beuc-x-2021-018_eu_consumer_protection.0_0.pdf [https://perma.cc/NQL4-XLE8].

services in order to claim rights.⁷⁹ However, this profile is not true of citizens who lack access to the internet and digital devices because they live in rural areas or cannot afford it. Digital government and automation can be hazardous for vulnerable citizens either because the systems are designed with an average citizen in mind, which may create access barriers to services, or because they are based on historical data, which may result in the unfair processing of administrative requests. For example, personalization, online targeting, and profiling are easily merged for the sake of optimization, allowing governments to profile citizens as “potential fraudsters” needing stricter surveillance.⁸⁰ The advancement of digital technology can thus expose citizens to greater situational vulnerabilities due to digital and informational asymmetries.⁸¹

Digitalization and critical engagement with automation require average levels of literacy and digital skills, including a sufficient understanding of how automated systems operate, especially the data and algorithms.⁸² For vulnerable citizens who combine limited digital literacy with a set of other negative features (for example, no access to stable Internet), the use of digital government may be impossible and effectively amount to digital exclusion. This phenomenon affects mostly women, minorities, senior citizens, and less-educated individuals either throughout their lives, or in traumatic life events, when they lack the choice or the motivation to employ the necessary technology.⁸³ Nevertheless, it can affect almost anybody at some point in life. According to Professor Martha Albertson Fineman,

79. Martha Albertson Fineman, *Fineman on Vulnerability and Law*, NEW LEGAL REALISM (Nov. 30, 2015), <https://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law> [<https://perma.cc/XNH3-YVZK>] (“Western systems of law . . . imagine[] a ‘liberal legal subject’ as the ideal citizen – this subject is an autonomous, independent[,] and fully-functioning adult, who inhabits a world defined by individual, not societal responsibility, where state intervention or regulation is perceived as a violation of his liberty.”)

80. See Marvin van Bekkum & Frederik Zuiderveen Borgesius, *Digital Welfare Fraud Detection and the Dutch SyRI Judgment*, EUR. J. SOC. SEC., 2021, at 1, 6.

81. HELBERGER ET AL., *supra* note 78, at 25.

82. Ina Sander, *Critical Big Data Literacy Tools—Engaging Citizens and Promoting Empowered Internet Usage*, 2 DATA & POL’Y e5-1, e5-3 (2020) (arguing that “today’s citizens of datafied societies require an extended *critical big data literacy*”).

83. See Laura Faure, Patricia Vendramin & Dana Schurmans, *A Situated Approach to Digital Exclusion Based on Life Courses*, INTERNET POL’Y REV., May 2020, at 6, 12.

vulnerability is universal; all individuals can become vulnerable at some point when their lives take unexpected and tragic turns.⁸⁴

In conclusion, digital technology promised to alleviate the burden of bureaucracy, which was particularly heavy on those who need government the most. However, millions of vulnerable citizens are not able to engage with digital government without committing mistakes or missing out on important information. It is in this context that empathy in government can play a role to close the gap between connected and disconnected citizens.

II. EMPATHY IN LAW AND GOVERNMENT

Administrative law's complex, and sometimes inflexible, procedures and requirements were developed to govern the administration and regulation of government agencies both at federal and local levels.⁸⁵ Regardless of the many differences between the United States' administrative system and that of other countries, it is fair to say that administrative law throughout the world was developed to control a *human* executive power.⁸⁶ Therefore, the exercise of discretion is limited, procedural rules guiding decision-making should be followed, citizens have several rights (for example, the right to be heard), and there has been a recent trend to further objectify administrative law.⁸⁷

However, with the growing automation and dehumanization of administrative law, many of the old problems in this field disappear and novel concerns (for example, algorithmic bias) emerge.⁸⁸

84. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 8–10 (2008); see Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 266, 268–69 (2010).

85. See FOX, *supra* note 32, at 1–5 (introducing administrative law).

86. On the differences between U.S. and German administrative law, see Rose-Ackerman, *supra* note 36.

87. See Short, *supra* note 72 (proposing reason-giving in administrative law as an accountability mechanism); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 *MICH. L. REV.* 1239, 1244–45 (2017) (discussing the role of internal measures as oversight mechanisms for agency operations and how they encourage consistency, predictability, and reasoned decision-making). For more general information on judicial objectivity, see generally Robert W. Bennett, *Objectivity in Constitutional Law*, 132 *U. PA. L. REV.* 445 (1984).

88. See Coglianese, *supra* note 3, at 113–14 (arguing that the responsible use of automation may outperform traditional administrative law tools in the future, underlining the need for empathy in an automated state). As Professors Ryan Calo and Danielle Keats Citron have argued,

Automation has not been as clear a win for governmental efficiency and fairness as administrators had hoped and as vendors have claimed. It has not eliminated bias but

Administrative systems are now required not only to regulate the flaws of humans but also those of machines and the possibly flawed interaction between humans and machines.⁸⁹

This Part delves into one element that thus far has been inherent to the human implementation of administrative law: empathy. This Part discusses the concept of empathy, its role in law and government, and how empathy can contribute to the advancement of justice and fairness.

A. *What is Empathy in Law and Public Administration?*

1. *Definition.* Empathy is an elusive concept with no consensus as to how it should be defined and its purpose.⁹⁰ The word was only Latinized to become “empathy” in the twentieth century, when it was then introduced in the English language.⁹¹ The word originates from the translation of the German word “*Einfühlung*, meaning ‘feeling into.’”⁹² Empathy is a component of social cognition that contributes to our capacity to understand others and adapt our behavior accordingly.⁹³

Over the last years, there have been attempts to assess empathy according to objective standards. The Toronto Empathy Questionnaire, a self-reported assessment that measures emotional

rather traded the possibility of human bias for the guarantee of systemic bias. Prior failures have not informed present efforts. Instead, problems have multiplied, diversified, and ossified.

Calo & Citron, *supra* note 15, at 819.

89. On the interaction between humans and automated systems, see generally Tim Wu, *Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems*, 119 COLUM. L. REV. 2001 (2019) (assessing the prospect of artificial intelligence replacing human court systems); Meg Leta Jones, *The Right to a Human in the Loop: Political Constructions of Computer Automation and Personhood*, 47 SOC. STUD. SCI. 216 (2017) (comparing the role of humans in automated decisions in the United States and Europe, noting that in the European context, the concept of human in the loop is important as automated decisions always require the presence of a human decision-maker).

90. Edlins, *supra* note 23, at 23.

91. Theresa Wiseman, *A Concept Analysis of Empathy*, 23 J. ADVANCED NURSING 1162, 1163 (1996).

92. *Id.*

93. R. Nathan Spreng, Margaret C. McKinnon, Raymond A. Mar & Brian Levine, *The Toronto Empathy Questionnaire: Scale Development and Initial Validation of a Factor-Analytic Solution to Multiple Empathy Measures*, 91 J. PERSONALITY ASSESSMENT 62, 62 (2009) (“Empathy is an important component of social cognition that contributes to one’s ability to understand and respond adaptively to others’ emotions, succeed in emotional communication, and promote prosocial behavior.”).

compassion and cognitive elements of empathy, is widely used.⁹⁴ Examples of the prompts that target emotional empathy are, “[i]t upsets me to see someone being treated disrespectfully,” and, “[o]ther people’s misfortunes do not disturb me a great deal.”⁹⁵ Cognitive empathy can be measured through prompts such as, “I can tell when others are sad even when they do not say anything.”⁹⁶ The emotional component of empathy involves sympathy or “feeling sorry” for someone, while the adoption of a different perspective requires the cognitive process of apprehending visual, auditory, or situational cues.⁹⁷

The concept of empathy is present in many public sector areas and in related scholarship; education, health, public health, and social work all require, at some point, empathic reactions from street-level bureaucrats, that is, the government employees interacting with the public.⁹⁸ Empathy is a value in public service.⁹⁹ It does not provide concrete answers on how to act and decide, but it alerts decision-makers to moral choice and their responsibility to analyze different perspectives.¹⁰⁰ Empathy is needed because it helps achieve subjective justice, ensuring that the process itself is fair and parties feel they are truly heard, as opposed to objective justice which amounts to a strict compliance with established procedures. Even though administrative law in different jurisdictions is primarily concerned with objective

94. *See id.* at 66 (discussing the “creation of a unidimensional empathy questionnaire”). On the validity and reliability of the Toronto Empathy Questionnaire, see generally Ntina Kourmoussi, Eirini Amanaki, Chara Tzavara, Kyriakoula Merakou, Anastasia Barbouni & Vasilios Koutras, *The Toronto Empathy Questionnaire: Reliability and Validity in a Nationwide Sample of Greek Teachers*, 6 SOC. SCI. 62 (2017) (examining its validity and reliability in a population of Greek teachers).

95. Nathan Spreng, Margaret C. McKinnon, Raymond A. Mar & Brian Levine, *Toronto Empathy Questionnaire (TEQ)*, PSYCH. TOOLS, <https://psychology-tools.com/t1366orontoonto-empathy-questionnaire> [<https://perma.cc/3B5G-WFEE>].

96. *See id.* (including the question in the survey).

97. Katherine P. Rankin, Joel H. Kramer & Bruce L. Miller, *Patterns of Cognitive and Emotional Empathy in Frontotemporal Lobar Degeneration*, 18 COGNITIVE BEHAV. NEUROLOGY 28, 29–30 (2005).

98. Dolamore, *supra* note 23, at 61.

99. *See* Dolamore, *supra* note 23, at 61 (noting that studies have suggested empathy can influence public sector employee retention, improve imagination, and increase public interest). *See generally* Mariglynn Edlins & Stephanie Dolamore, *Ready To Serve the Public? The Role of Empathy in Public Service Education Programs*, 24 J. PUB. AFFS. EDUC. 300 (2018) (discussing the role of empathy in education).

100. Henderson, *supra* note 58, at 1653.

justice, subjective justice has become increasingly important in the last two decades.¹⁰¹

In this Article, I define empathy as the ability to acknowledge, respond, and understand the situation of others, including their challenges and concerns.¹⁰² Yet, empathy is not only an innate ability, but also a skill that can be further developed if often practiced.¹⁰³ Empathy is not reduced to an emotion: it is something we feel, do, and can improve through practice.¹⁰⁴

2. *Empathy in Law.* The role of empathy in law has been particularly present in the literature on judicial lawmaking and compassion.¹⁰⁵ Empathy is discussed here in connection with the protection of the rule of law as well as in the context of procedural rights (for example, the right to be heard). Compassion helps judges better understand and describe a situation experienced by another person, thus increasing the quality of legal reasoning since it improves multi-perspectival imagination.¹⁰⁶ Case law abounds with examples of empathy or the lack thereof. Empirical research on procedural justice has demonstrated that legal empathy can increase an individual's perception of the fairness of judicial outcomes and the legitimacy of the system.¹⁰⁷ In the United States, legal scholarship has discussed the role of empathy or the lack thereof in a number of the Supreme Court's decisions, including *Brown v. Board of Education (Brown I)*,¹⁰⁸ *Shapiro*

101. See, e.g., Andrea Shemberg, *Mediation as an Alternative Method of Dispute Resolution for the Individuals with Disabilities Education Act: A Just Proposal?*, 12 OHIO ST. J. ON DISP. RESOL. 739, 745–46 (1997) (noting that, in 1995, both the U.S. House of Representatives and Senate introduced bills amending the Individuals with Disabilities Education Act (“IDEA”) to include mediation as a dispute resolution mechanism).

102. See generally Edlins & Dolamore, *supra* note 99 (drawing on empirical studies, the article explores the importance of empathy in public service education programs).

103. Edlins, *supra* note 23, at 25–26.

104. *Id.* at 28.

105. Del Mar, *supra* note 13, at 143 (arguing that compassion can help judges understand better the position of defendants and that “imagining by feeling” is not a threat to the rule of law but a condition of it); see also Susan A. Bandes, *Compassion and the Rule of Law*, 13 INT'L J.L. CONTEXT 184, 191–92 (2017) (discussing the role of compassion in the implementation of the rule of law).

106. Del Mar, *supra* note 13, at 153.

107. See generally E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (discussing theory and research on procedural justice and exploring its legal implications).

108. *Brown v. Bd. of Ed. (Brown I)*, 347 U.S. 483 (1954).

v. Thompson,¹⁰⁹ *Roe v. Wade*,¹¹⁰ *Bowers v. Hardwick*,¹¹¹ and *DeShaney v. Winnebago County Department of Social Services*.¹¹²

DeShaney is often cited in this context. It considered the role of a county child protection authority in protecting a child that had endured years of domestic violence.¹¹³ The plaintiff asked the U.S. Supreme Court to interpret whether the Due Process Clause imposes an affirmative duty on the county to protect the child from private violence with a guarantee of a minimum level of protection.¹¹⁴ The Court decided that it did not.¹¹⁵ The quality of the judgment could have been improved if it had been informed by compassion, especially in the characterization of the facts.¹¹⁶ This would mean considering not only the perspective of the victim, but also that of the caseworkers and the local department of social services.

In *Henderson v. Shinseki*,¹¹⁷ the U.S. Supreme Court ruled unanimously that a deadline for military veterans who appealed the federal government's denial of benefits does not need to be rigidly enforced.¹¹⁸ The justices sided with a mentally ill Korean War veteran whose appeal was blocked because he missed a 120-day deadline for

109. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

110. *Roe v. Wade*, 410 U.S. 113 (1973).

111. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

112. See *Henderson*, *supra* note 58, at 1577, 1593–1649 (discussing empathy in *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Roe v. Wade*, 410 U.S. 113 (1973); *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 189 (1989).

113. *DeShaney*, 489 U.S. at 191.

114. *Id.* In 1984, four-year-old Joshua DeShaney became comatose and then profoundly mentally disabled due to traumatic head injuries inflicted by his father who beat him over a long period of time. *Id.* at 193. The Winnebago County Department of Social Services had taken various steps to protect the child after receiving numerous complaints of the abuse; however, the Department had not acted to remove Joshua from his father's custody. *Id.* at 191–93. Joshua DeShaney's mother subsequently sued the Winnebago County Department of Social Services, alleging that the Department “had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence . . . of which they knew or should have known.” *Id.* at 193. The Court concluded that the Due Process Clause does not impose a special duty on the state to provide services to the public for protection against private actors if the state did not create those harms. *Id.* at 196–97.

115. *Id.* at 196–97, 202.

116. See Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1138–39 (1990) (arguing that a compassionate interpretation of *DeShaney*'s facts leads judges to better understand the facts of Joshua's abuse and the law).

117. *Henderson v. Shinseki*, 562 U.S. 428 (2011).

118. *Id.* at 431.

judicial review by fifteen days.¹¹⁹ Writing for the court, Justice Samuel Alito explained that

[t]he [Department of Veterans Affairs] is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt. . . . Rigid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with this scheme.¹²⁰

This case shows that the violation of deadlines ought to be considered in light of the broader functions of the field of law they serve and the specific position of the parties. Judges are expected to consider all relevant circumstances when applying the law. Additionally, empathy asks judges to apply the law considering the position of different parties. More generally, judges and public authorities should seek to understand fully what is at stake for litigants, to perceive facts with humility (for example, by relying on experts), and to practice empathy toward both citizens and public authorities and their representatives.¹²¹ The practice of empathy in the application of law and the pursuit of the public interest also includes conducting balancing and reasonableness tests in administrative decision-making.¹²²

B. Empathy in Public Administration

Empathy is a public service value that is presented in the public administration and public policy literature as “supportiveness,” “nurturance,” “open-minded reasoning, . . . fairness,” “altruism, . . . moral conviction,” and “caring” for others.¹²³ Empathy coexists with

119. *Id.* at 433.

120. *Id.* at 440–41.

121. Bandes, *supra* note 105; see RICHARD S. PETERS, *REASON AND COMPASSION* 79 (1973) (“[H]umility . . . is necessary to the whole-hearted acceptance of the possibility that one may be in error.”); see also Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 167–75 (2013) (discussing empathy and the role of judges).

122. Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 1972 (2012).

123. MARY E. GUY, MEREDITH A. NEWMAN & SHARON H. MASTRACCI, *EMOTIONAL LABOR: PUTTING THE SERVICE IN PUBLIC SERVICE* *passim* (2008); CAROL W. LEWIS & STUART C. GILMAN, *THE ETHICS CHALLENGE IN PUBLIC SERVICE: A PROBLEM SOLVING GUIDE* 164 (3d ed. 2012) (noting that stakeholder analysis, which operationalizes values like open-minded reasoning and fairness, requires understanding a situation from the victim’s perspective); Gene A. Brewer, Sally Coleman Selden & Rex L. Facer II, *Individual Conceptions of Public Service Motivation*, 60 PUB. ADMIN. REV. 254, 255 (2000) (noting that affective motives of public service

other public service values, such as efficiency and accountability, and requires public servants to seek to understand citizens' needs in the context of government transactions and regulations.¹²⁴ The literature on empathy in public administration can be divided into two main strands: the study of the instruments that create empathy as a means to an end, often as an ingredient for better relationships between citizens and government to enhance public trust; and the study that aims to detect the existence of empathy as such in public organizations.¹²⁵

Empathy in public administration can be translated into different mechanisms, instruments, and stages of government transactions. Empathic discourse is one of them. For example, it can include mere but explicit expressions of empathy in letters or other direct communication sent to citizens, such as simple statements like “[w]e are certainly sympathetic and understanding of your desire to relocate,” humanizing public communication.¹²⁶ Street-level bureaucrats, as mediators between citizens and governments, can better translate law into justice through the practice of empathy. However, there are concerns that street-level bureaucrats may only show empathy when they can put themselves in the position of citizens due to shared identity characteristics.¹²⁷

Empathy can also be promoted through internal measures.¹²⁸ Public authorities annually issue a large number of general, nonbinding policy statements advising other authorities on how an agency

can include altruism, empathy, and moral conviction); James L. Perry, Jeffrey L. Brudney, David Coursey & Laura Littlepage, *What Drives Morally Committed Citizens? A Study of the Antecedents of Public Service Motivation*, 68 PUB. ADMIN. REV. 445, 447 (2008) (noting that individuals who volunteer display higher levels of values akin to those in public service, including caring for others).

124. See Dolamore, *supra* note 23, at 78 (using an empathy emphasis framework to analyze the Housing Authority of Baltimore City). See generally COGLIANESE, *supra* note 25 (arguing that regulatory excellence must involve a certain degree of empathy translated into the empathic engagement with all segments of society when issuing decisions and exercising authority).

125. Dolamore, *supra* note 23, at 63. For an example of the literature that focuses on empathy as a means to create trust, see generally Lisa A. Zanetti & Cheryl Simrell King, *Transformational Public Service Revisited: Possibilities for Changing the Discipline?*, 35 ADMIN. THEORY & PRACTICE 128 (2013). For an example of scholarship that focuses on the detection of moments of empathy, see Gavin Oxburgh & James Ost, *The Use and Efficacy of Empathy in Police Interviews with Suspects of Sexual Offences*, 8 J. INVESTIGATIVE PSYCH. & OFFENDER PROFILING 178 *passim* (2011).

126. Dolamore, *supra* note 23, at 76–77.

127. Edlins & Dolamore, *supra* note 99, at 300.

128. See generally Metzger & Stack, *supra* note 87 (discussing the importance of internal norms in shaping agency decisions).

proposes to interpret the law or exercise discretion.¹²⁹ Guidance exists in all shapes and sizes, and it is present in both common law and civil law systems. Its function, process, applicability, limits, and role in adjudication and judicial review are at the core of administrative law scholarship in Western countries.¹³⁰ Empirical research has demonstrated that agency officials are sometimes flexible when following guidance.¹³¹

In the United States, like elsewhere, administrative agencies have the power in many cases to be flexible and to fail to enforce the law under special circumstances, since this can be the most reasonable outcome for the case.¹³² This is particularly true when the blind application of law without regard for the diverse needs of the citizenry would not be aligned with the principles of good administration and good governance, because empathy—considering individuality—is a key element of good governance.¹³³ In circumstances where governments must make highly consequential decisions affecting the well-being of individuals, empathy can also demand that administrative agencies provide “opportunities for human interaction” to listen to “expressions of concern.”¹³⁴ However, empathy is not a panacea for administrative law. Empathy is thought to open the door to legal uncertainty and “‘individualized’ justice,” ushering in more discretion for judges and other legal decision-makers.¹³⁵ The following subpart explores these objections.

129. See Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 287–317 (2018) (discussing at length case law on policy statements).

130. See Metzger & Stack, *supra* note 87, at 1249–63 (discussing the role and status of internal administrative law, including administrative guidance).

131. Nicholas R. Parrillo, *Federal Agency Guidance and the Power To Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 174 (2019) (discussing the findings of a qualitative empirical study of federal agency guidance).

132. On the decision to not enforce the law, see generally Aaron L. Nielson, *How Agencies Choose Whether To Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018) (providing a taxonomy of nonenforcement and arguing that nonenforcement should be limited by important safeguards to avoid abuses).

133. Coglianese, *supra* note 3, at 113 (arguing that the responsible use of automation might outperform in the future traditional administrative law tools and underlining the need for empathy in an automated state).

134. *Id.*

135. As Toni Massaro explains,

The argument for more empathy often includes a call for more “individualized” justice. The claim is that judges should focus more on context – the result in *this* case to *these* parties – and less on formal rationality – squaring this result with results in

C. *Against Empathy in Law and Government*

The role of empathy in the interpretation of law is disputed. Strictly legal interpretations can exclude moral or empathic elements. On the one hand, the notion of justice is more than formal. It also contains a substantive meaning that implicates considering shared perspectives and differing viewpoints.¹³⁶ On the other hand, accounting for compassion, empathy, and other feelings in law is criticized for posing challenges to rationality, overall fairness, predictability, consistency, and ultimately, the rule of law.¹³⁷ Moreover, incorporating experiential understandings of facts, persons, and groups does not fit in legal systems that seek to be guided by values of predictability and determinacy, fearing any instruments that can destabilize the status quo.¹³⁸ Also, empathy could be easily abused by legal decisionmakers and give rise to corruption and nepotism, problems which administrative law has tried to combat for decades.

The negative impact of empathy on discretionary powers is an additional objection to its introduction in administrative law. Empathy can subvert the core principles of administrative law since, in theory, room for empathy could extend discretionary powers. This objection is only partially true. To illustrate, empirical research conducted on the impact of street-level bureaucrats has confirmed that discretionary decision-making is affected by empathy, and this can have an impact on street-level bureaucrats' everyday priorities in the exercise of their functions.¹³⁹

However, this study also showed that this impact is highly dependent on a number of factors. First, high or low empathy from

other cases. This means that law must be more open-ended or general, and that legal decisionmakers must be given greater flexibility to reach "right" decisions.

Massaro, *supra* note 51, at 2116.

136. Deigh, *supra* note 13 (arguing that empathy is essential to legal interpretation).

137. Bandes, *supra* note 105, at 184 (arguing that compassion poses difficult challenges for the rule of law and that its role should be limited to aiding decision-makers in better understanding what is at stake for the litigant).

138. See generally Henderson, *supra* note 58 (reviewing literature critical of the role of empathy in law, arguing that empathy and legality are not mutually exclusive concepts, and contending that empathy can revolutionize habitual legal thinking and, due to its explanatory power, transform legal problems.).

139. Didde Cramer Jensen & Line B. Pedersen, *The Impact of Empathy – Explaining Diversity in Street-Level Decision-Making*, 27 J. PUB. ADMIN. RSCH. & THEORY 433, 440–41 (2017) (investigating whether the empathic abilities of street-level bureaucrats have an impact on their discretionary decision-making).

street-level bureaucrats is very often determined by the attitude with which citizens approach them, the balance between client-related concerns, and the protection of more significant administrative concerns.¹⁴⁰ Second, drawing on existing scholarship on administrative behavior, this study showed once again that bureaucrats' exercise of empathy cannot only be reduced to personal interests or policy preferences.¹⁴¹ Were this the case, it would indeed be perilous to advance a legal concept that allows for more room to pursue individual interests. Third, the boundaries of discretionary powers can determine the way in which street-level bureaucrats exercise their empathy and whether they allow their personal attributes to amplify their empathic abilities.¹⁴² Street-level bureaucratic behavior, including empathic actions, are a product of both institutional and personal characteristics, and the former can be shaped by the clear redesign of how empathy should be exercised in the administrative context.

Emotion and empathy are inherent parts of law from its very conception in the political sphere. There is some irony in the rejection of empathy in law, as legislation can be the ad hoc reaction to an emotional case, but once a legislative proposal moves from the realm of politics to law, agencies and judges are expected to cleanse it of any emotion for the sake of the rule of law.¹⁴³ Furthermore, empathy in law can be operationalized¹⁴⁴ to encompass concrete proposals for legislative, doctrinal, and procedural reforms that encourage decision-

140. *Id.* at 440.

141. *See* Jensen & Pedersen, *supra* note 139, at 440–42; *see also* HERBERT A. SIMON, *ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATION* 205 (4th ed. 1997).

142. Vibeke Lehmann Nielsen, *Personal Attributes and Institutions: Gender and the Behavior of Public Employees. Why Gender Matters to Not Only "Gendered Policy Areas"*, 25 *J. PUB. ADMIN. RSCH. & THEORY* 1005, 1007 (2014) (investigating whether gender plays a role in the way in which public employees exercise their functions, particularly with regard to competitiveness, empathy, and systemizing); *cf.* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges To Rule for Women's Issues?*, 59 *AM. J. POL. SCI.* 37, 38 (2015) (demonstrating that judges with daughters consistently vote in a more feminist fashion on gender issues than judges who have only sons, suggesting that personal experiences influence how judges make decisions, and thus that empathy may indeed be a component in how judges decide cases).

143. Henderson, *supra* note 58, at 1575 (“[W]hile emotion may generate laws via ‘politics,’ once those laws meet whatever criteria are necessary to constitute legitimacy in a system, they are cleansed of emotion under this vision of the Rule of Law. The law becomes not merely a human institution affecting real people, but rather The Law.”).

144. *See infra* Part IV.

makers to seek to not only hear, but also understand, multiple voices and communities.¹⁴⁵

III. THE LOSS OF EMPATHY IN THE DIGITAL ADMINISTRATIVE STATE: A COMPARATIVE ANALYSIS

This Part discusses how the digitalization and automation of the administrative state reduce existing pockets of empathy and contributes to the narrow regard for citizens' diverse needs. This Part explores two examples of limited empathy in the automation of welfare: the Dutch Childcare Benefits scandal and the MiDAS scandal. These examples illustrate how the automation of welfare can easily reduce vulnerable citizens to faceless numbers whose lives can be destroyed because of algorithmic biases and incorrect data.

A. *Dutch Childcare Benefits Scandal*

In January 2021, the Dutch government resigned amid a longstanding scandal over child benefits that had affected more than twenty thousand families in the Netherlands.¹⁴⁶ The Dutch Prime Minister acknowledged that Dutch tax authorities had “wrongly hunt[ed] down thousands of families,” “ma[king] the government an enemy of its people.”¹⁴⁷ Drawing on large databases and computational algorithms, the Dutch tax authorities wrongly accused thousands of citizens of fraudulently claiming child allowance over several years from 2012.¹⁴⁸ More than half of these families were commanded to repay tens of thousands of euros due to the strict application of the law, which did not account for the human impact of these sudden

145. Massaro, *supra* note 51, at 2124–25 (further adding that the operationalization of empathy requires turning to “very difficult questions. How, for example, should we measure our progress toward a goal of empathic law? What do communitarian rules look like? Who should the lawmakers be in an empathic legal system? How do we realize, in a workable way, these utopian objectives?”).

146. Jon Henley, *Dutch Government Resigns over Child Benefits Scandal*, *GUARDIAN* (Jan. 15, 2021, 9:32 AM) [hereinafter Henley, *Dutch Government Resigns*], <https://www.theguardian.com/world/2021/jan/15/dutch-government-resigns-over-child-benefits-scandal> [<https://perma.cc/FHV6-G8X4>].

147. Henley, *supra* note 20.

148. UNPRECEDENTED INJUSTICE, *supra* note 21, at 29 (“The regular information on progress relating to the administration of the childcare allowance was centred around big numbers, targets, and key performance indicators, rather than on the hard and distressing consequences of the anti-fraud approach that some of those applying for the allowance were faced with.”).

repayments.¹⁴⁹ Some investigations were triggered by “something as simple as an administrative error, without any malicious intent.”¹⁵⁰

The Parliamentary committee responsible for investigating this scandal stated that

the desire among politicians for the administration of benefits to be carried out efficiently and the wishes of politicians and society at large to prevent fraud resulted in the creation and implementation of legislation that permitted little scope, if any, for taking account of people’s individual circumstances, such as administrative errors committed with no ill-intent.¹⁵¹

However, most citizens affected by this injustice could not navigate the complex bureaucratic system, as they were either unable to engage with digital governance in a country where most services are online, or they suffered from ethnic profiling and could not prove authorities wrong.¹⁵² Computational algorithms did not have any consideration for individual needs and vulnerabilities, like limited digital literacy, and neither did human public servants who trusted their results.¹⁵³ Furthermore, citizens were unable to defend themselves before public bodies, as they were overwhelmed by the bureaucracy they had to face.¹⁵⁴ These investigations and consequent sanctions drove hundreds of citizens into situations of homelessness, divorce, and bankruptcy, with some even losing parental rights because they were found unable to care for their children due to psychological and financial stress.¹⁵⁵ Embedded ethnic profiling was one of the key problems of the digital technology used.¹⁵⁶ More than half of these families had immigrant

149. As the report provides,

The Childcare Act entered into force on 20 October 2004, creating the right to claim childcare allowance from the year 2005. The Act provides the statutory basis for childcare allowance. In essence, the childcare allowance amount depends on the ability of the parents to pay and the costs of childcare. . . . Section 26 states that if it is established that benefits have been paid that should not have been, the whole amount must be repaid. A discussion is now taking place as to whether there is some leeway in that provision, Section 26, but reading it at first sight, it is a fairly strict provision.

Id. at 35–36.

150. Henley, *supra* note 20.

151. UNPRECEDENTED INJUSTICE, *supra* note 21, at 7.

152. Boztas, *supra* note 21; *see* UNPRECEDENTED INJUSTICE, *supra* note 21, at 9.

153. UNPRECEDENTED INJUSTICE, *supra* note 21, at 7.

154. *See* Boztas, *supra* note 21.

155. *See id.*; Holligan, *supra* note 21.

156. *See* UNPRECEDENTED INJUSTICE, *supra* note 21, at 14 (“[T]he risk-classification model entailed improper and discriminatory processes (between March 2016 and October 2018 at least),

backgrounds, which were identified by algorithmic systems designed to detect large-scale fraud.¹⁵⁷ In 2021, after a parliamentary report showed that tax authorities had wrongfully accused these citizens and the courts' judicial review was inadequate, the Dutch government—the Prime Minister and his entire cabinet—resigned over this scandal.¹⁵⁸ The Prime Minister apologized for this injustice, acknowledging that “[i]nnocent people [had] been criminali[z]ed and their lives ruined.”¹⁵⁹

B. MiDAS

MiDAS was designed as an unemployment algorithmic decision-making system to ensure that unemployment checks were distributed only to eligible individuals.¹⁶⁰ However, it rapidly became an asset in the optimization of the Michigan Unemployment Insurance Agency (“UIA”), allowing the reduction of rising unemployment claims and the elimination of more than four hundred workers.¹⁶¹ Moreover, MiDAS grew in use to become a weapon against fraud.¹⁶² The agency suddenly detected a fivefold increase in the number of cases of fraud.¹⁶³ From the penalties for fraud, MiDAS generated an unprecedented

given that the nationality of applicants was used for the ‘Dutch citizenship’ indicator in the model.”).

157. *See id.* at 10–11.

158. Henley, *Dutch Government Resigns*, *supra* note 146.

159. Holligan, *supra* note 21.

160. Alejandro de La Garza, *States Automated Systems Are Trapping Citizens in Bureaucratic Nightmares with Their Lives on the Line*, TIME (May 17, 2020), <https://time.com/5840609> [<https://perma.cc/2NR2-Z7JX>].

161. Matthew B. Seipel, *Robo-Bureaucrat and the Administrative Separation of Powers*, 2020 CARDOZO L. REV. DE NOVO 99, 105; Editorial, *State Will Pay for Cutting Corners With Unemployment System Automation*, TRAVERSE CITY REC. EAGLE (Dec. 7, 2019), https://www.record-eagle.com/opinion/editorials/editorial-state-will-pay-for-cutting-corners-with-unemployment-system-automation/article_6794c522-192b-11ea-9df2-676c5450b875.html [<https://perma.cc/63DE-S9B6>]; Robert N. Charette, *Michigan’s MiDAS Unemployment System: Algorithm Alchemy Created Lead, Not Gold*, IEEE SPECTRUM (Jan. 24, 2018), <https://spectrum.ieee.org/michigans-midas-unemployment-system-algorithm-alchemy-that-created-lead-not-gold> [<https://perma.cc/TE27-XYJA>].

162. KATE CRAWFORD, ROEL DOBBE, THEODORA DRYER, GENEVIEVE FRIED, BEN GREEN, ELIZABETH KAZIUNAS, AMBA KAK, VAROON MATHUR, ERIN McELROY, ANDREA NILL SÁNCHEZ, DEBORAH RAJI, JOY LISI RANKIN, RASHIDA RICHARDSON, JASON SCHULTZ, SARAH MYERS WEST & MEREDITH WHITTAKER, 2019 REPORT 35–36 (2019), https://ainowinstitute.org/AI_Now_2019_Report.pdf [<https://perma.cc/3G2Y-337R>].

163. Charette, *supra* note 161; *see* CRAWFORD ET AL., *supra* note 162.

amount of revenue for the UIA.¹⁶⁴ Nonetheless, much like the Dutch Childcare Benefits scandal, there were many failures in the system. MiDAS resulted in thirty-four thousand false accusations of unemployment fraud.¹⁶⁵ The financial stress and overwhelming pressure on the alleged fraudsters culminated in multiple personal tragedies, ranging from evictions to divorces, credit score destruction, and homelessness.¹⁶⁶ To collect the repayments—that could go up to \$187,000—the state could immediately garnish a person’s wages, seize federal and state income tax refunds, and refer for criminal prosecution if payments were not received.¹⁶⁷

Unlike the Dutch scandal, the MiDAS scandal did not have the same long-lasting effect thanks to the work of activists, lawyers, and courts. Advocates representing accused fraudsters were able to prove that many wrongful fraud accusations were digitally generated without human intervention or review, resulting in a 93 percent margin of error.¹⁶⁸ Even when there had been a human in the loop, the human often trusted the system, resulting in a 44 percent error rate.¹⁶⁹ The system was based on incomplete data, and it did not distinguish between intended fraud and administrative errors.¹⁷⁰ Also, computer-generated notices were drafted in such a way that recipients would inadvertently admit to the fraud.¹⁷¹ Additionally, notifications were sent to old addresses or through dormant online accounts that recipients no longer checked, having long since stopped receiving those benefits.¹⁷² The agency did not take any additional steps, like connecting through email, mail, or phone calls to notify the claimants,

164. The harsh penalties of 400 percent on the claimed amount of fraud also contributed to the sharp rise. Charette, *supra* note 161.

165. *Id.*

166. Ryan Felton, *Criminalizing the Unemployed*, DET. METRO TIMES (July 1, 2015), <https://www.metrotimes.com/detroit/criminalizing-the-unemployed/Content?oid=2353533&storyPage=2> [<https://perma.cc/3V8T-D3P9>]; MICHELE GILMAN & MARY MADDEN, *DIGITAL BARRIERS TO ECONOMIC JUSTICE IN THE WAKE OF COVID-19*, at 14–15 (2021).

167. *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 894 (6th Cir. 2019); *see de La Garza, supra* note 160.

168. A study found that from October 2013 to September 2015, MiDAS robo-adjudicated 40,195 cases with no human involvement, and those decisions had an 85 percent error rate. Charette, *supra* note 161.

169. *Id.*

170. *See Egan, supra* note 18.

171. *See Cahoo*, 912 F.3d at 893.

172. *Id.*

and it never answered over 90 percent of the calls to its “Help Line.”¹⁷³ In many cases, by the time alleged fraudsters received the agency’s message, the thirty day period to contest or appeal the fraud determination had passed.¹⁷⁴ Claimants were not even informed about the basis for fraud suspicion, and MiDAS did not allow fact-based adjudication but automatically sent them multiple-choice questionnaires.¹⁷⁵

In both the Dutch Childcare Benefits and MiDAS scandals, citizens with different backgrounds were unfairly treated because they were unable to navigate digital bureaucracy and automated decision-making. Moreover, the results produced by the automated systems were presumed to be correct, even though they later proved to be flawed. Existing legal frameworks allowed for this unfair treatment through strict application of the law without consideration for the personal circumstances of applicants. However, in the Dutch case, administrative courts, including the highest court for this type of matter, the Dutch Council of State, did not assist citizens.¹⁷⁶ The lack of scrutiny and accountability, plus excessive focus on anti-fraud policies and efficiencies, made public authorities blind to the possible vulnerabilities of the system and its citizens.

IV. ADMINISTRATIVE DIGITAL EMPATHY

This Part elaborates on the concept of administrative empathy and explains how empathy can be used in ex ante and ex post government

173. *Id.* at 894 (“[O]ut of the last 50,000 calls the ‘Help Line’ received before the Auditor General conducted the audit, ‘not a single one had been answered or returned.’” (citation omitted)).

174. *Id.*; PETER RUARK, FALLING SHORT 2017: MICHIGAN’S UNEMPLOYMENT INSURANCE CONTINUES TO NEGLECT MANY WORKERS WHO NEED IT 8 (Jan. 2018), <https://mlpp.org/report-falling-short-2017-michigans-unemployment-insurance-continues-to-neglect-many-workers-who-need-it> [<https://perma.cc/WL4X-RZAA>].

175. *Cahoo*, 912 F.3d at 893.

176. As the Committee notes,

[F]or many years the administrative justice system also played a significant part in perpetuating the ruthless application of the legislation on childcare allowance, over and above what was prescribed by law. In doing so, the administrative justice system neglected its important function of safeguarding the legal rights of individual citizens.

UNPRECEDENTED INJUSTICE, *supra* note 21, at 7; see also *Council of Europe Slams the Netherlands over Benefit Scandal*, DUTCH NEWS (Oct. 12, 2021), <https://www.dutchnews.nl/news/2021/10/council-of-europe-slams-the-netherlands-over-benefit-scandal-failings> [<https://perma.cc/6YMA-FXF4>] (noting that judges overwhelmingly ruled in favor of the Dutch tax office in cases falsely alleging benefits fraud).

transactions to ensure that digital administrative states balance abstract public values, like efficiency, with citizen needs, and ensure that public authorities act meaningfully when interacting with the output of algorithms.

A. *What Administrative Empathy Is Not*

Administrative law is inherently characterized by multiple paradoxes. It must protect the public interest and individual rights at the same time, even though the balance between them is often a complex equation. It should promote justice, but bureaucracy establishes obstacles that make it difficult for administrative actors to always pursue justice. In the words of Professor Jerry Mashaw, “[i]n a legal culture largely oriented toward court enforcement of individual legal rights, ‘administration’ has always seemed as antithetical to ‘law’ as ‘bureaucracy’ is to ‘justice.’”¹⁷⁷ Administrative empathy is not a concept that aims to resolve contests between these or other conflicting values. Instead, administrative empathy can help guide public authorities and judges when trying to understand different viewpoints, with enhanced humility.¹⁷⁸

“Empathic automation” or “emotional AI” are not oxymorons, but they certainly do not resemble human notions of empathy that refer to “commonality of feelings” or “feeling into” someone else’s situation. Automated empathy refers to the “use[] [of] computational means bodies to infer and ‘feel into’ psycho-physiological states (emotions, moods, affects, fatigue, attention, intention.)”¹⁷⁹ Emotion-recognition systems have been frowned upon in the European context, namely in the proposed EU AI Regulation, because of their potential to manipulate humans.¹⁸⁰ This subject, and the essence of emotion-

177. JERRY MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* 1 (1983).

178. Bades, *supra* note 105, at 194.

179. Andrew McStay, Professor of Digital Life, Bangor Univ., UK, Automating Empathy: Social Impact, Mediated Emotion and Subjectivity, IEEE Society on Social Implications of Technology, Address Before a Joint Meeting of IEEE UK and Ireland SSIT, at 06:04 (May 27, 2021), <https://ieeetv.ieee.org/channels/ssit/automating-empathy-social-impact-mediated-emotion-and-subjectivity> [<https://perma.cc/8UAZ-P6YL>]; see Andrew McStay, *Emotional AI and EdTech: Serving the Public Good?*, 45(3) *LEARNING MEDIA & TECH.* 270 (2020).

180. Frederieke Reinhold & Angela Müller, *AlgorithmWatch’s Response to the European Commission’s Proposed Regulation on Artificial Intelligence—A Major Step with Major Gaps*, *ALGORITHM WATCH* (Apr. 22, 2021), <http://algorithmwatch.org/en/response-to-eu-ai-regulation-proposal-2021> [<https://perma.cc/A2Y9-E4F2>] (providing an overview of some of the key risks of high-risk AI systems and criticizing the European Commission’s proposal).

recognition systems, does not fit within the scope of this Article. However, its existence is a matter to consider in the future for the following reason: It would be risky to try to replicate empathy in the human sense of recognizing emotion and “feeling for others” in automated systems. This could result in manipulating citizens and public servants. However, the fact that automated systems can acknowledge the existence of different subjective factors is an important element. Developing empathic automated systems can be helpful if empathy is regarded not only as the exercise of having compassion for others or experiencing emotions of commonality, but also as an interpretation tool.

B. Empathy Ex Ante

This Article argues that understanding a certain legal situation from the perspective of vulnerable citizens implicates transforming legal systems and policies from within. This Part presents two ways of approaching ex ante empathy: First, public authorities should start by rethinking the digitalization and automation of government services and decision-making. This includes questioning the need for digitalization and automation, creating opportunities for meaningful contact with government, and devising valid offline alternatives for citizens who cannot engage with digital technology. Second, ex ante empathy can be promoted through more inclusive communication and design of platforms and institutions and reducing the distance between governments and citizens. Both strategies aim to redesign digital governance and automation with a diverse citizenry in mind.¹⁸¹

1. *The Right to Meaningful Contact with Government.* The plea for a more humanized digital government does not amount to the disappearance of digital tools. Digitalization and automation have become inescapable realities in government. This Article rethinks the need for digitalization and automation by balancing the costs and benefits of the digital administrative state. In this cost-benefit analysis, the impact of technology on human lives, such as discrimination, has to be taken into account. The EU has taken a first step in this direction in its AI Regulation proposal by proposing a ban on certain automated

181. For a thorough human-rights study of the digital divide, the importance of accounting for diversity in the study of the digital divide, see generally ANNE PEACOCK, HUMAN RIGHTS AND THE DIGITAL DIVIDE (2019).

systems with the potential of manipulating or discriminating against citizens, like facial recognition in publicly accessible areas.¹⁸² This strict approach to the regulation of AI can inspire other areas of government to rethink the use of indiscriminate automation in complex policies.¹⁸³ Poverty is one of them; it is inherently a situation of vulnerability that has many different causes and consequences, and also cannot be reduced to categories. It requires a fundamentally human approach with minimal automation.¹⁸⁴

The legitimacy of government is driven by trust, public values, fairness, and democracy.¹⁸⁵ In the context of the digital administrative state, the quest for greater legitimacy does not give citizens the right to always have personal contact with public servants.¹⁸⁶ However, contact with government should be more meaningful than an automated email in the case of life-changing government transactions. A solution to this could entail the consolidation of government hotlines with more meaningful assistance for citizens.¹⁸⁷ Existing rules that seek to keep a human in the loop in the context of automated decisions do not suffice. Research shows that the technical medium used for communication is not always devoid of political meaning, and that human public servants may refrain from correcting possible negative implications and looking

182. *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, at 13, COM (2021) 206 final (Apr. 21, 2021).

183. For a reflection on the future regulation of AI, including the value of human empathy when compared to automated systems, see generally François Cadelon, Rodolphe Charne di Carlo, Midas De Bondt & Theodoros Evgeniou, *AI Regulation Is Coming*, HARV. BUS. REV. (Sept.–Oct. 2021), <https://hbr.org/2021/09/ai-regulation-is-coming> [<https://perma.cc/WV4R-9G86>].

184. For a reflection on the ethics framework of AI with regard to the specificities of different applications, see ELEANOR BIRD, JASMIN FOX-SKELLY, NICOLA JENNER, RUTH LARBAY, EMMA WEITKAMP & ALAN WINFIELD, EUROPEAN PARLIAMENTARY RSCH. SERV., *THE ETHICS OF ARTIFICIAL INTELLIGENCE: ISSUES AND INITIATIVES* 16 (2020), [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU\(2020\)634452_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/634452/EPRS_STU(2020)634452_EN.pdf) [<https://perma.cc/YY7Y-U8RM>].

185. See generally Calo & Citron, *supra* note 15 (arguing that administrative agencies that automate risk undermine the legitimacy of an administrative state premised on nimble and flexible agency expertise).

186. For more on the relevance of the medium of communication between government and citizens, see generally Bruce Bimber, *The Internet and Citizen Communication with Government: Does the Medium Matter?*, 16 POL. COMMUN 409 (1999).

187. This was also suggested by Raad van State. *Ongevraagd advies over de effecten van de digitalisering voor de rechtsstatelijke verhoudingen*. [*Unsolicited Opinion on the Effects of Digitizing Constitutional Relations*], § 4.1, RAAD VAN STATE, <https://www.raadvanstate.nl/@112661/w04-18-0230> [<https://perma.cc/JE9X-3YDP>].

critically at the results.¹⁸⁸ As the following subsection shows, better communication with citizens is also part of the solution to government's legitimacy deficit.¹⁸⁹ However, it is not everything. An empirical study shows that "government . . . and politicians remain alien to many members of society . . . [and] government suffers from a lack of authenticity and an inability to show emotion, be human or demonstrate empathy."¹⁹⁰

Ex ante empathy can be thus translated into different strategies that can make government more human, empathetic, and, hence, more legitimate, including building institutions within government that—regardless of the level of digitalization of the administrative state—still reach out to citizens and maintain relationships with people. In *Radical Help*, Hillary Cottam argues that social welfare systems should be profoundly reformed by establishing human connections with citizens.¹⁹¹ Cottam claims that when people feel supported by strong human relationships, change happens.¹⁹² Rather than creating additional distance with technology, governments should rethink where technology truly can be of added value away from where it can deteriorate the rights of citizens (for example, by targeting minorities), and how to introduce meaningful human elements that make the digital administrative state more legitimate.

2. *Inclusive Communication and Design.* Digital technology, and consequently digital government, will only be inclusive when all citizens have comparable internet access and skills, and ability to engage with technology on critical terms.¹⁹³ This means that digital

188. See Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 133–34 (1980) (discussing the way in which technology may embody power, authority, and politics). The interaction between humans and AI remains complex. See Kailas Vodrahalli, Tobias Gerstenberg & James Zou, *Do Humans Trust Advice More If It Comes from AI? An Analysis of Human-AI Interactions 5–7* (July 14, 2021) (unpublished manuscript), <https://arxiv.org/pdf/2107.07015.pdf> [<https://perma.cc/872J-HXZZ>].

189. *Infra* Part IV.A.2; see also Calo & Citron, *supra* note 15, at 844 (describing some concerning by-products of an increasingly automated government).

190. CTR. FOR PUB. IMPACT, FINDING A MORE HUMAN GOVERNMENT 5 (2018).

191. See generally HILARY COTTAM, *RADICAL HELP* (2020) (discussing the failures of longstanding welfare policies).

192. *Id.* at 57–61.

193. See Olivier Sylvain, *Network Equality*, 67 HASTINGS L.J. 443, 469–72 (2016) (arguing that disparities in broadband access reinforce inequality in many aspects of life, including education, employment, and employability).

government must work on overcoming both its bureaucratic and digital barriers.

However, accessible, inclusive, and truly empathic digital governance begs for institutional efforts to go beyond traditional digital government strategies that merely convert analog bureaucracy into online forms. It requires institutional and cultural changes, greater interactions between agencies instead of maintaining “silo culture,” more training for public servants, and employing digital technology that offers a good balance between government interests and citizen needs.¹⁹⁴ Thus far, only one Western country has designed its digital government to be truly transformational: Estonia.

Estonia is one of the world’s most advanced countries in digital governance.¹⁹⁵ Estonia has a unique model, with 100 percent digitalization of government services with seamless technological and management tools that do not burden citizens.¹⁹⁶ For example, “Estonia’s Public Information Act prohibits institutions from requesting user information already stored in a data repository connected to the [country’s primary e-government system called] X-Road.”¹⁹⁷ Moreover, citizens receive most benefits automatically instead of applying (for example, benefits for the birth of a child because children have a digital identity from birth).¹⁹⁸ It has been estimated that digitalization has saved an average of thirty minutes per government transaction per citizen, or 5.4 working days per year per

194. BENJAMIN ROSETH, ANGELA REYES & CARLOS SANTISO, WAIT NO MORE: CITIZENS, RED TAPE, AND DIGITAL GOVERNMENT 155 (2020); Bernhard Seliger, *E-Government in a Federal State: The Case of the Introduction of E-Government in Germany in the Early 2000s*, in HANDBOOK OF RESEARCH ON E-GOVERNMENT READINESS FOR INFORMATION AND SERVICE EXCHANGE: UTILIZING PROGRESSIVE INFORMATION COMMUNICATION TECHNOLOGIES 381, 390 (Hakikur Rahman ed., 2010).

195. Paloma Krõõt Tupay, *Estonia, the Digital Nation: Reflections of a Digital Citizen’s Rights in the European Union*, 6 EUR. DATA PROT. L. REV. 294, 294 (2020). For a thorough overview of the Estonian digital government model, see generally *id.*

196. ROSETH ET AL., *supra* note 194, at 158.

197. WORLD BANK, WORLD DEVELOPMENT REPORT 2016: DIGITAL DIVIDENDS 279 Box 5.13 (2016) [hereinafter DIGITAL DIVIDENDS].

198. See Krõõt Tupay, *supra* note 195, at 297; *Estonia’s Digital Ecosystem Is Creating a Seamless Society*, E-ESTONIA (Aug. 13, 2021), <https://e-estonia.com/estonias-digital-ecosystem-is-creating-a-seamless-society> [https://perma.cc/A8V7-EVW8] (noting that one of the leading companies behind Estonian digital government “launched a proactive service for the customers of the Social Insurance Board . . . [meaning] that parents of a newborn no longer need to apply for benefits, but receive a proactive proposal from the government for the benefits they are entitled to, which they simply have to confirm”).

person.¹⁹⁹ Estonia also provides advanced digital literacy education to citizens from a young age.²⁰⁰ The success of the Estonian model is the result of a combination of factors—small country, solid internet infrastructure, and constitutional framework—that cannot be easily reproduced in a larger and more diverse jurisdiction. Some aspects of Estonia’s digital government can nonetheless serve as an inspiration for other countries: the focus on broad institutional changes rather than on specific initiatives, regardless of initial agency resistance; the coordination between the public and private sectors; and the holistic approach to government, which includes the imperative to rethink the need for new reforms every decade and a half.²⁰¹ Moreover, the Estonian Constitution establishes in Paragraph 44 that Estonia is an open information society where “everyone has to have free access to public information and state agencies and local governments have the duty to inform citizens about their activities and give them access to information the institutions own about them.”²⁰²

In Europe, the European Commission and its Member States have invested over the last years in the development of guidelines for simple and inclusive digital governments. An illustration of this is the French program that seeks to increase citizens’ trust in government and their use of digital government.²⁰³ The French government created a website with some of the most common mistakes made by citizens when engaging in a government transaction or when a certain life event requires them to take bureaucratic action, such as a move, the birth of

199. See DIGITAL DIVIDENDS, *supra* note 197. For example, digital signatures alone saved twenty minutes per government transaction. *Id.* at 118.

200. *Frequently Asked Questions: Digital Competences*, E-ESTONIA BRIEFING CTR., <https://e-estonia.com/wp-content/uploads/2020mar-faq-a4-v02-digitalcompetences-1.pdf> [<https://perma.cc/86HV-ZWHA>] (last updated Mar. 2020).

201. See Meelis Kitsing, *Success Without Strategy: E-Government Development in Estonia*, 3 POL’Y & INTERNET, Feb. 2011, at 1, 8–18 (providing an overview of digital government developments in Estonia).

202. Krõõt Tupay, *supra* note 195, at 299–300 (citing 1992 CONST. OF THE REPUBLIC OF ESTONIA § 44).

203. *Developper la Confiance Numerique [Develop Trust in Digital Technology]*, AGENCE NATIONALE DE LA SÉCURITÉ DES SYSTEMS D’INFORMATION [NATIONAL AGENCY FOR THE SECURITY OF INFORMATION SYSTEMS] (2016) [hereinafter ANSSI], https://www.ssi.gouv.fr/agence/missions/rapports-dactivites/nos-publics-et-nos-actions_v2016/developper-la-confiance-numerique [<https://perma.cc/ZB7C-3VRA>].

a child, unemployment, or the death of a loved one.²⁰⁴ This platform also includes multiple checklists in simple language.²⁰⁵

User-friendly, simple technological tools, such as platforms and pre-filled forms, are also simple strategies which, in theory, could lower access barriers to digital government and increase citizens' willingness to use digital government.²⁰⁶

Solutions such as the French website can be criticized because they will only reach those who are already online and are able to find government platforms. However, this is a significant step in the direction of more *ex ante* empathy because it does not place all the burden on citizens to gather all relevant information, but creates a one-stop shop for government information. In sum, user-friendly, simple technological tools, such as platforms and pre-filled forms, are also simple strategies which, in theory, could lower access barriers to digital government and increase citizens' willingness to use digital government. Additional programs like public digital assistance programs and digital literacy training for adults could further help vulnerable citizens comply with bureaucratic requirements for assistance. Public digital assistance programs and digital literacy training for adults are additional instruments that can help vulnerable citizens comply with their obligations.

C. *Empathy Ex Post*

This Section discusses the need to consolidate citizens' procedural rights by adopting a duty to forgive and meaningfully assist citizens facing exceptional circumstances. These circumstances can only be decided on a case-by-case basis and guided by a proportionality reasoning. But they can include severe illness, extreme poverty, or any personal challenge that can justify why a citizen is not able to act in a better way, defend their rights and interests, and comply with the law. This duty could entail forgiving citizens for missing a deadline, giving them additional time to furnish evidence, holding additional hearings to understand their positions better, or reversing the burden of proof

204. MINISTÈRE DE LA TRANSFORMATION ET DE FONCTION PUBLIQUES [MINISTRY OF TRANSFORMATION AND PUBLIC SERVICE], <https://www.oups.gouv.fr> [<https://perma.cc/BEZ3-CMAE>].

205. *Id.*

206. *See generally* ANSSI, *supra* note 203. For a discussion of the accessibility of digital infrastructure in the United States, see *Designing Accessible and Inclusive Digital Public Infrastructure*, NEW AM., <https://www.newamerica.org/digital-impact-governance-initiative/blog/designing-accessible-and-inclusive-digital-public-infrastructure> [<https://perma.cc/MM7J-EVAD>].

so that the public authority—rather than the vulnerable citizen—has to prove elements detected by automated systems. This empathic approach toward citizens is inspired by the idea that administrative law should be imbued with different perspectives to be truly empathic and fact-based. This proposal also draws on recent developments in Dutch and French law.

In the Netherlands, administrative law aims in theory to compensate for the inequality in power between government and citizens.²⁰⁷ However, as documented in Part III, this room for empathy is slowly fading with automation due to the increasingly limited—and less meaningful—human intervention of public servants. The Dutch National Ombudsman has criticized the rapid but fragmented switch to digital government, which requires citizens in need to go to great lengths to claim online all the benefits they are entitled to.²⁰⁸ Digitization has not resolved this siloed and compartmentalized feature of welfare benefits. Rather, it has worsened it for vulnerable populations.²⁰⁹ Multiple official notifications are now only sent online; the European Court of Human Rights considers this shift to digital notifications to be proportionate because of the high percentage of internet access.²¹⁰ Nevertheless, citizens with challenging circumstances, such as extreme stress due to severe long-term illness or poverty, can easily lose track of email notifications and miss important deadlines like submitting a statement of objections or an appeal of an administrative decision.

In 2020, the Administrative Division of the Dutch Council of State, which traditionally maintained a strict position regarding breach of delays, revisited its position.²¹¹ The Court acknowledged that special

207. See Ben Schueler, *De Awb-rechter na 25 jaar: een karakterschets* [*The Awb Judge After 25 Years: A Character Sketch*], DE NEDERLANDSE VERENIGING VOOR RECHTSPRAAK [DUTCH COURTS ASSOCIATION] (Jan. 2019), https://trema.nvvr.org/uploads/documenten/downloads/2019-01_Schueler_De-Awb-rechter.pdf [<https://perma.cc/K7MX-ESHU>].

208. See NATIONALE OMBUDSMAN, DE BURGER GAAT DIGITAAL [THE CITIZEN GOES DIGITAL] 13, 21–22 (2013), https://www.nationaleombudsman.nl/uploads/2013170_de_burger_gaat_digitaal.pdf [<https://perma.cc/KE2H-AVPS>].

209. *Id.* at 22.

210. *Id.*; see *Stichting Landgoed Steenberg v. the Netherlands*, 19732/17 Eur. Ct. H.R. (2021).

211. See ABRvS [Council of State, Administrative Jurisdiction Division] (Neth.), Jan. 22, 2020, n^o 201901989/1/A3, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2020:175> [<https://perma.cc/YUT4-PZEM>] (excusing appellants' failure to execute a residential building permit within one year after it was published in an inconspicuous "Other Information"

circumstances should sometimes be accepted to excuse citizens using governmental portals for not appealing an administrative decision within the legal deadline.²¹² This case may suggest the need to adopt a more lenient and citizen-friendly approach.²¹³ This position is also aligned with the Dutch Council of State's recent opinion on good administration and digitalization of government, where the institution underlined the need to keep providing meaningful interaction with citizens and limit the expansion of automated services and decision-making.²¹⁴

The idea of forgiving citizens for their mistakes can also be detected to a smaller extent in French administrative law. In 2018, the French legislature recognized a right to make a one-time mistake.²¹⁵ This right to make a mistake was widely publicized and attracted a great deal of national and international attention.²¹⁶ Applying this right implicates the practice of limited empathy because the conditions for its implementation are well-defined and circumscribed to first-time mistakes. Nevertheless, little is known outside France about its application and the risk that this right overpromises.

The duty to try to understand the position of citizens, create a framework for forgiveness, and convey empathy within an evidence-based context is not a panacea. Future guidance and further reflection are needed to identify when and how this duty should be applied. Empathy should not amount to numerous individual exceptions that fully dismantle the efficiencies that automated systems may give rise to and create legal uncertainty. Rather, this is a duty to expand public authorities' diligence in preparing administrative adjudication, gather evidence on the fallibility of the automated system, and question

tab without their awareness); see Annemarie Drahmman, Case Note, *Verschoonbare termijnoverschrijding E-mailservice van www.overheid.nl* [*Excusable Time Limit: E-mail Service from www.overheid.nl*], 2020 *COMPUTERRECHT*, no. 86, ¶¶ 1, 5.

212. See Drahmman, *supra* note 211, ¶ 3 (describing the court's excusal of the appellants for exceeding the permit limit in this unique circumstance).

213. *Id.* ¶ 6 (endorsing the Dutch Council of State's more flexible approach, placing higher value on the citizen's perspective).

214. RAAD VAN STATE, *supra* note 187, §§ 1, 3.1.

215. Kim Willsher, *French Parliament Passes Law Giving Citizens the Right To Make Mistakes*, *GUARDIAN* (Jan. 24, 2018, 5:56 AM), <https://www.theguardian.com/world/2018/jan/24/french-parliament-passes-law-giving-citizens-the-right-to-make-mistakes> [<https://perma.cc/G8QZ-99L9>]; *Qu'est-ce que le droit à l'erreur face à l'administration?* [*What Is the Right To Error in the Face of Administration?*], REPUBLIQUE FRANÇAISE, <https://www.service-public.fr/particuliers/vosdroits/F34677> [<https://perma.cc/B8E7-VMZY>] (last updated Sept. 10, 2020).

216. See, e.g., Willsher, *supra* note 215.

whether citizens could have acted differently under those circumstances. An enhanced duty of diligence and evidence-based empathy are especially important when preliminary steps like risk indicators are taken by automated systems.

However, the duty to empathize should be a duty imposed primarily on public authorities to ensure that they are trained to be mindful of the opportunities and risks of digital technology for the procedural rights of vulnerable citizens. The central message of this attempt to flesh out administrative empathy in the digital administrative state is that public authorities should redesign digital government and adjudication systems to facilitate the contact between citizens and government, and they should not blindly trust digital technology, but rather conduct meaningful investigations into the individual situations of citizens.

CONCLUSION

Empathy receives suspicion from administrative lawyers as it is often reduced to emotion. Yet, this Article does not argue for more emotion in the digital administrative state, since emotional arguments only focus on one perspective and may impede the full understanding of the citizen's position. Instead, this Article contends that, more than before, the digital administrative state needs multiple viewpoints and more attention to individual circumstances.²¹⁷ Empathy in law requires human interventions, humane assessments, and concrete human stories rather than abstract and strictly juristic appeals to legal principles. In an increasingly automated and digitized world, this can be the response to the blindness of large datasets and large numbers as well as the opacity of automated systems.

Empathy is an important public service value but, like other public values, it does not take priority over others such as efficiency.²¹⁸ Nor is empathy a goal in itself, but rather a means to make public administration more humane, democratic, and legitimate.²¹⁹ This will

217. See Henderson, *supra* note 58, at 1650 (articulating the importance of empathy as a component of legal discourse).

218. See Torben Beck Jørgensen & Barry Bozeman, *Public Values: An Inventory*, 39 ADMIN. & SOC'Y 354, 370 (2007); Anthony DeForest Molina & Cassandra L. McKeown, *The Heart of the Profession: Understanding Public Service Values*, 18 J. PUB. AFFS. EDUC. 375, 382 fig.1 (2012); Dolamore, *supra* note 23, at 78.

219. See Zanetti, *supra* note 25 (describing empathy as the "foundation" of public service).

ultimately help enhance citizens' trust in government and administrative law.

Existing administrative law principles offer sufficient flexibility to accommodate many of the challenges posed by digital government and automation.²²⁰ Digitization and automation have nonetheless reinforced an old problem affecting the administrative state: the bureaucratic and complex character of administrative procedures and the inability of millions of citizens to navigate it on adequate and equal terms. Administrative empathy is not just a solution for digital and automated administrative systems. Human decision-makers can also lack emotion, be inflexible, and be unwilling to listen to concerns and to bend the rules to guarantee material justice. However, only human decision-makers can choose to be empathic and design a legal framework where vulnerable citizens feel seen and heard. Ultimately, to be human is to be vulnerable, to err, and to empathize with others.

220. Coglianese, *supra* note 3, at 105.