INTRODUCTION

There has been much discussion in philosophical literature in recent years about what has come to be known as “constitutivism”, or the “constitutive strategy”.¹ The main ambition of this strategy is to find a solution to the so-called normative question, namely, the search for the ultimate grounds of moral reasons, by showing that these grounds are to be found in the constitution, or essential makeup, of human agents.² This solution is clearly and explicitly the offspring of a Kantian approach to normativity, based on an explanation of the inherent constitution of agency (of our ability to act) and on a series of transcendental arguments. Typically considered a champion of this view is Christine Korsgaard, who first argued for it in *The Sources of Normativity* (Cambridge University Press, 1996) and continues to do so in her recent book, *Self-constitution: Agency, Identity, and Integrity* (Oxford University Press, 2009). Richard Velleman, too, has argued extensively for a constitutivist view, in *The Possibility of Practical Reason* (Oxford University Press, 2000) as well as in his recent *How We Get Along* (Cambridge University Press, 2009). It is


also worth noting that the fundamental argument at the core of these views may be traced back to Alan Gewirth’s “argument from agency”, expounded in *Reason and Morality* (The University of Chicago Press, 1978). And recently, in *The Normative Claim of Law* (Hart Publishing, 2009), the constitutivist view has been applied by Stefano Bertea to the problem of the normativity of law.

Oddly enough, many authors who in recent years have dealt with the constitutivist strategy seem to have overlooked the striking similarities it bears to another Kantian approach to moral normativity, namely, discourse ethics (*Diskursethik*). This is the view put forward over the last forty years by Karl-Otto Apel and Jürgen Habermas, as in Apel’s *Transformation der Philosophie* (Suhrkamp, 1973) and Habermas’s *Moralbewußtsein und kommunikatives Handeln* (Suhrkamp, 1983), and it is aimed at grounding moral normativity as constitutive of discursive rationality. This same view has been applied to the problem of law’s normativity by Robert Alexy, for example in his *Theorie der juristischen Argumentation* (Suhrkamp, 1978) and in *Begriff und Geltung des Rechts* (Karl Alber GmbH, 1992), and by George Pavlakos in his recent *Our Knowledge of the Law* (Hart Publishing, 2007).

In this paper, Korsgaard’s and Apel’s work are discussed as paradigmatic of the two aforementioned approaches and are brought into comparison by underscoring how they complement each other. The discussion is laid out as follows. In Section 1, I explain how Korsgaard’s constitutivist strategy and Apel’s discourse ethics revolve around transcendental arguments, and in Sections 2 and 3 I specifically take up their theories and bring out their similarities. In Sections 4 and 5, I discuss the sense in which these two approaches can be considered as a single approach; that is, I will show them to be interdependent, arguing in particular (in Section 4) that a central challenge to discourse ethics can be answered by appealing to the constitutivist strategy,

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3 It is mainly for the sake of simplicity and clarity that I have chosen these two authors as paradigmatic. In fact, I believe that, with some adjustment, the arguments developed in this paper can be extended to Richard Velleman and Stefano Bertea as regards the constitutivist strategy and to George Pavlakos as regards the discursive approach. This is why I will draw on these other authors when that will prove necessary to elaborate on my points.
and that the converse is also true (Section 5). In Section 6, I outline a merged approach obtained by combining some basic tenets from the constitutivist strategy with some from discourse ethics. I draw my conclusions in Section 7, pointing out that even though this merged approach has more explanatory punch than the two independent views from which it issues, it nonetheless falls short of answering some other crucial problems confronting those views.

1. THE TRANSCENDENTAL STRUCTURE

In *The Grounds of Ethical Judgment* (Oxford University Press, 2003), Christian Illies discusses as two variants of the same transcendental approach to the moral foundation Alan Gewirth’s derivation of the right to freedom from the constitution of human agency and Karl-Otto Apel’s transcendental arguments for discourse ethics. In this paper, I will attempt a similar comparison between Korsgaard’s constitutivist and Apel’s discursive approach to normativity. For the sake of brevity, I will take up Illies’s terminology and will call Korsgaard’s central argument “the argument from agency” and Apel’s “the argument from discourse”.

As was just mentioned, both Korsgaard’s argument from agency and Apel’s argument from discourse are aimed at finding an answer to the problem of the moral foundation, namely, the question of how moral reasons can ultimately be grounded: Why must I do what moral norms ask of me? Why should I follow them? Where does the normativity of moral reasons ultimately come from? These are all variants of what Korsgaard calls the ‘normative question’ and Apel the problem of the ‘ultimate foundation of ethics.’ Both Korsgaard and Apel think that this question cannot be solved through an appeal to direct experience, such as the experience we have of natural phenomena. Indeed, both authors describe in full detail how the materialistic conception stemming from the scientific revolution inevitably rules out the possibility of

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deriving values from any description of the world.\(^5\) Hence, the normative question, the quest for the ultimate moral foundation, is not something we can hope to solve by looking at moral phenomena in the same way as we look at natural phenomena, because natural phenomena are morally neutral.

This does not mean, however, that the normative question is something we cannot find an answer to: Korsgaard and Apel both think it possible to answer the normative question by changing the observer’s point of view. Natural phenomena are something we observe from the outside: We apply to them our rational capacities and formulate hypotheses about their structure and behaviour, possibly gaining significant confirmations or refutations. Not so with moral phenomena. As Hans Albert has famously argued, when the normativity of moral norms is analyzed from the outside, it falls subject to the “Münchausen Trilemma”, whereby any moral justification must inevitably lapse into an infinite regress or into circularity or into *petitio principii*.\(^6\)

This “external” point of view is not, however, necessary. According to Apel, any attempt to ground moral normativity from this point of view is fated to fall into the Münchausen Trilemma, because that view necessarily compels us to answer the normative question by tracing normativity to a higher principle different from that around which we have framed the question, thus pushing the same question further along indefinitely. Further, the external point of view is not just unnecessary according to Korsgaard: It is also *insufficient* as a way to go about answering the normative question, because this question arises in ‘the first-person position of the agent who demands a justification of the claims which morality makes upon him.’\(^7\) As Korsgaard writes in another passage, ‘*[v]alue, like freedom, is only directly accessible from the standpoint of reflective consciousness. [...]* Trying to actually see the value of humanity from

\(^5\) See, for example, K-O Apel, “Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik,” in Transformation der Philosophie (Frankfurt am Main, Suhrkamp, 1973) 361–363; and Korsgaard, Sources above n 2, 1–5.


\(^7\) Korsgaard, Sources above n 2, 16.
the third-person perspective is like trying to see the colours someone sees by cracking open his skulls.\(^8\)

Moreover, aside from being neither necessary nor sufficient, the external point of view is even impossible in some cases. Korsgaard and Apel both agree that we cannot have such an external knowledge of everything: There are some things that we, as human and rational agents, cannot but view from within. Why? Because, in a sense, we are those things. Hence, if we could demonstrate that moral normativity inevitably stems from what we are, then we would manage to find the source of moral normativity—this not from an external point of view but from an internal, or rather, a reflective one.

This project for the foundation of normativity revolves around a transcendental argument, meaning an argument that proceeds from two fundamental features: first, a starting point that we cannot but take for granted (here, rationality); and second, the derivation of something inevitably linked to that starting point, something constitutive of that starting point. Korsgaard’s and Apel’s arguments differ significantly in the specific fleshing out of such an argument, but both can be traced to this common transcendental core.

Some authors have drawn a distinction between “explorational” and “retorsive” transcendental arguments.\(^9\) Explorational transcendental arguments proceed from a given starting point assumed as necessary, and then derive conclusions inevitably linked thereto, conclusions typically constitutive of that starting point. The structure of these arguments is that of a modus ponens, with the second premise in contrapositive form: Necessarily A; if not necessarily B, then A is impossible; hence, necessarily B. Retorsive transcendental arguments instead have the typical structure of a reductio ad absurdum and are designed to show that calling something into doubt is absurd because such calling into doubt would necessarily presuppose that which is doubted. The structure of these arguments is therefore apagogic: The sceptic says “Not necessarily A”; if

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\(^8\) Korsgaard, Sources above n 2, 124.

\(^9\) The terms explorational and retorsive I take up from Illies, The Grounds, 31ff., but the same distinction has been advanced in other contexts, too. See, for example, C Roversi, “Constitutionalism and Transcendental Arguments,” Northern Ireland Legal Quarterly 1 (2008) 59.
the sceptic says “Not necessarily A”, then necessarily A; the sceptic falls into contradiction; hence, necessarily A.

Korsgaard’s argument from agency and Apel’s argument from discourse can be recast as transcendental arguments differing by the distinction just mentioned. Which is to say that Korsgaard could be said to use an explorational transcendental argument and Apel a retorsive one. These two arguments will briefly be reconstructed in the following Sections 2 and 3 on the basis of this distinction, but I should point out from the start that the distinction is not to be taken too much at face value. Indeed, as will be made clear, Korsgaard clearly derives from her main explorational transcendental argument another retorsive argument inextricably bound up with the first. And, conversely, however much Apel prefers to cast his argument as a retorsive one, there are passages in which he reframes it in an explorational form.

2. KORSGAARD’S ARGUMENT FROM AGENCY

Korsgaard’s argument for constitutivism has two variants, one discussed in her 1996 book *The Sources of Normativity* and the other in her recent *Self-constitution*, of 2009.

The first variant of Korsgaard’s argument proceeds from the premise that we, as human beings, are self-conscious individuals. As such, we can distance ourselves from our perceptions and impulses and consider whether they are good reasons for the beliefs and actions we take up. It is this reflective scrutiny, essentially consisting in our seeking reasons, that raises the normative question. In *The Sources of Normativity* (and this is indeed a central point of her view in general), Korsgaard argues at length that we could not discern what counts as a reason for us if we did not have what she calls a ‘practical identity’. She writes in this regard: ‘When you deliberate, it is as if there were something over and above all of your desires, something which is you, and which chooses which desire to act on. This means that the principle or law by which you determine your actions is one that you regards as being expressive of

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10 See Korsgaard, *Sources* above n 2, 93.
yourself.’ 11 In Korsgaard’s view, this practical identity is therefore the source of normativity for all our reasons: ‘Your reasons express your identity, your nature; your obligations spring from what that identity forbids.’ 12 And she further maintains that we cannot be governed by our practical identity without necessarily valuing our being human as a crucial part of that identity: ‘[T]his reason for conforming to your particular practical identities is not a reason that springs from one of those particular practical identities. It is a reason that springs from your humanity itself, from your identity simply as a human being, a reflective animal who needs reasons to act and to live.’ 13 Hence, Korsgaard concludes, given that we act under reflective scrutiny, we must treat our practical identity as normative, and so must value our being human as a fundamental part of that identity. But this is not confined to our human nature. We cannot, in Korsgaard’s view, value ourselves as human beings without valuing other human beings, too, this because these other beings can immediately elicit in us reasons for valuing them which are analogous to the reasons we have for valuing ourselves. 14 The conclusion is that human identity, both ours and that of other people, is for us a normative affair.

The second variant of Korsgaard’s argument is not essentially different from the first. Indeed, Korsgaard describes it as having ‘the same conclusion, but with a more direct focus on agency.’ 15 Here the argument starts with the consideration that we, as human beings, cannot choose not to be agents. As Korsgaard states from the outset in Self-constitution, ‘Human beings are condemned to choice and action.’ 16 Korsgaard argues here for a specific concept of action roughly equivalent to “performing an act for the sake of an end”, thus building into that concept an essential link between actions and reasons: ‘An

11 Korsgaard, Sources above n 2, 100.
12 Korsgaard, Sources above n 2, 101.
13 Korsgaard, Sources above n 2, 121.
14 See Korsgaard, Sources above n 2, 143–145.
16 Korsgaard, Self-constitution above n 15, 1.
action is an essentially intelligible object that *embodies* a reason. As in *The Sources of Normativity*, Korsgaard proceeds here by maintaining that in order to be able to perform actions (in the sense of *action* just specified), we must see them as expressions of our selves as unified agents. In *Self-constitution*, however, Korsgaard draws from this essential connection between practical deliberation and identity the new conclusion that to act is to constitute ourselves as unified agents: Self-constitution through action is our essential function as rational agents. She then argues at length that we could not conceive of ourselves as unified agents—as agents distinct from the impulses we find within us—if we did not universalize our reasons in accord with the categorical imperative; she thus concludes that the categorical imperative is a constitutive standard of rational unified agents, its normativity depending on this constitutive role. However, the passage from valuing my own reasons to valuing the reasons of others is obtained by Korsgaard in a slightly different way here than in *The Sources of Normativity*. She maintains that acting as a unified agent is equivalent to interacting with others in accordance with reasons which can be shared, this because ‘acting is quite literally interacting with yourself’, in such a way that ‘constituting your own agency is a matter of choosing only those reasons you can share with yourself’. Thus, when acting as a unified agent, you make choices in keeping with reasons you may share with your future self—which is the same as acting according to reasons that you may share with any other rational agent. Hence, ‘respect for humanity is a necessary condition of effective action.’

It should be clear that these two are indeed explorational transcendental arguments. They start from a premise which claims to be necessarily true, namely, that we are reflective creatures, or agents. And, as happens with transcendental arguments, this is not meant to be simply an empirical or

17 Korsgaard, *Self-constitution* above n 15, 14.
18 See Korsgaard, *Self-constitution* above n 15, 42.
19 See Korsgaard, *Self-constitution* above n 15, 32–33, 72–76, 81.
21 Korsgaard, *Self-constitution* above n 15, 206.
scientific truth. Scientific truths are discovered from a third-person perspective, while a transcendental premise is something we should concede from our first-person perspective as agents, and as was just remarked, this latter perspective is the only one through which according to Korsgaard the normative question can be answered. Korsgaard’s transcendental deduction is meant to show that there is something necessarily presupposed in this reflective nature of ours, and this something is precisely the conclusion we are looking for, namely, moral normativity. The normativity embedded in human identity stems from our constitution as reflective and rational agents. Given that we cannot escape our reflective and rational agency, and given that moral normativity is constitutively linked to that agency, ‘moral identity is therefore inescapable.’

Normativity is in this view unconditional because constitutive of a game we cannot avoid playing. In fact, it is odd to even call it a game, because we are that game. Korsgaard seems not to worry about the doubts that many authors have raised about the normative status of constitutive rules. In her view, constitutive rules are standards, and as such are clearly normative, for otherwise we would not have a concept of defectiveness. Just as there is a conceptual distinction between a bad tool and a good one, and this distinction is owed to the normativity of the standards constitutive of a tool, so there is a distinction between good and bad human beings which is traceable to the constitutive standards of agency and humanity. That is to say that human beings must value humanity (as represented in themselves and in others) in the same sense of must involved in saying that a tool must serve its function. But Korsgaard does not stop here. Not only does she say that constitutive normativity is perfectly possible; she also says it is the only conceivable normativity which may claim to be unconditional: ‘[T]he only way to establish

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22 Korsgaard, *Sources* above n 2, 129–130.

the authority of any purported normative principle is to establish that it is constitutive of something to which the person whom it governs is committed.’ 24 Constitutive normativity is therefore not only unproblematic: From Korsgaard’s perspective, it becomes the basic paradigm of normativity.

This leads to a strong unified conception of normativity: Moral normativity is conceived by Korsgaard as continuous with epistemic normativity. In Self-constitution, Korsgaard argues the categorical imperative to be normative in the same sense as the laws of logic, since both serve to unify the agent and are as such an instance of constitutive normativity:

[I]f George lacks logic, his mind will be a disunified jumble of unrelated atomistic premises, unable to function as a mind at all. It will be a mere heap of premises. And that is where the normativity comes in. [...] The principles of practical reason, if they are to be normative, must be the principles of the logic of practical deliberation. They must be formal principles. For without such principles the will, like George’s mind, will be a mere heap, not of ideas now, but of impulses to act. 25

This constitutive role makes it so that, just as the laws of logic cannot figure as premises in a logical demonstration—because they are the conditions for the very possibility of logical reasoning—neither can the categorical imperative figure as a premise in practical reasoning, precisely because the categorical imperative is the fundamental law of practical deliberation. Practical reasoning presupposes from the outset the categorical imperative, and so it also consequently presupposes, in Korsgaard’s view, the value of humanity.

This means that Korsgaard’s argument can quite simply be reformulated as a retorsive transcendental argument. For if the sceptic asserts through reasoning that humanity should not be valued, then the sceptic (according to Korsgaard’s argument from agency) is by that very measure presupposing the value of humanity and is falling into contradiction. In The Sources of Normativity, Korsgaard discusses this retorsive reformulation of her argument from

24 Korsgaard, Self-constitution above n 15, 32.
25 Korsgaard, Self-constitution above n 15, 67.
discourse by referring to the debate between communitarians and liberals.\textsuperscript{26} According to a well-known communitarian critique, the liberal and universalistic conception of the person assumes an “empty self”: In the communitarian view, persons must instead conceive themselves as essentially situated in a specific culture and community. However, as Korsgaard argues, this tenet, which forms part of the communitarians’ practical identity, implies that they recognize human beings as having inherent value. In fact, if communitarians argue that cultural and communitarian bonds are to be valued for our development as human beings, they are thereby presupposing that human beings must be valued. As Korsgaard argues:

Someone who is moved to urge the value of having particular ties and commitments has discovered that part of their normativity comes from the fact that human beings need to have them. He urges that our lives are meaningless without them. That is not a reason that springs from one of his own particular ties and commitments. It is a plea on behalf of all human beings, which he makes because he now identifies in a certain way with us all. And that means that he is no longer immersed in a normative world of particular ties and commitments.\textsuperscript{27}

Korsgaard concludes this argument with an icastic formula: ‘Philosophical reflection does not leave everything just where it was.’ It may be worth noting that this same formula could perfectly serve as the motto of Apel’s retorsive argument from discourse, the topic to which I will now turn in the next section.

3. APEL’S ARGUMENT FROM DISCOURSE

It becomes immediately apparent, as we look at Korsgaard’s argument from discourse in its retorsive form, how the argument traces back to Apel’s well-known retorsive transcendental argument for the foundation of discourse ethics. In briefly presenting Apel’s argument, I will mostly consider his seminal work of 1973, titled \textit{Das Apriori der Kommunikationsgemeinschaft und die}

\textsuperscript{26} See Korsgaard, \textit{Sources} above n 2, 118–119.

\textsuperscript{27} Korsgaard, \textit{Sources} above n 2, 119.
In fact, even though Apel has extensively discussed and developed his work over the last thirty years, I believe that the core of his argument for the foundation of ethics has not significantly changed with respect to that initial statement.

The argument proceeds as follows. Moral scepticism should be regarded not as an abstract thought existing in vacuo, but as an interlocutor’s concrete assertion. This restatement of the sceptic challenge is rooted in Apel’s thorough criticism of what he calls ‘methodical solipsism’ (*methodischer Solipsismus*), the view that ‘the possibility and validity of judgments and of will-formation can in principle be understood [...] as a constitutive performance of individual consciousness.’ In Apel’s view (which in this respect takes up many classic Wittgensteinian arguments within a rationalistic framework), thought is essentially linked to language, and language is in its own turn understood as an essentially interactive phenomenon. The validity of individual thinking therefore presupposes communication between thinkers: Any assertion is essentially an argument advanced within a community. This means that, according to Apel, a sceptic doubting the possibility of any moral foundation does nothing different from making an assertion, such as “Moral judgments cannot be grounded” or “There is no moral reason that can be grounded.” But this pragmatic restatement of the sceptical doubt has some crucial consequences. In fact, sceptics asserting something as true are making a claim, namely, that they can defend their thesis against any possible interlocutor. Hence, in advancing such a thesis, moral sceptics implicitly endow their potential interlocutors with rights (among which the right to advance reasonable

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28 It should be noted that Apel does not use the expression *discourse ethics* (*Diskursethik*) in this essay. This is an expression originally used by Habermas in *Moralbewusstsein und kommunikatives Handeln*, an expression Apel later adopted himself: see, for example, K-O Apel, “Diskursethik als Verantwortungsethik: Eine postmetaphysische Transformation der Ethik Kants,” in *Kant in der Diskussion der Moderne*, ed. G Schönrich and Y Kato (Frankfurt am Main, Suhrkamp, 1996) 326ff.

29 Apel, *Das Apriori* above n 5, 375 n. 26; my translation.

30 See Apel, *Das Apriori* above n 5, 399–400.

31 See Apel, *Das Apriori* above n 5, 401.
objections), while at the same time implicitly taking on obligations and duties (among which the duty to pertinently reply), this because ‘assertions are at least implicitly connected with communicative actions—actions making moral claims on all the members of the community of communication [Kommunikationsgemeinschaft].’

In arguing against the possibility of any ethics, moral sceptics therefore implicitly presuppose some moral norms, namely, ‘the basic moral norms [die moralischen Grundnormen] of a community of critical communication.’ These moral norms are described by Apel as follows:

Whenever we make an argument, we implicitly recognize all the possible claims that any member of the community of communication can make which can be justified through rational arguments [...], and at the same time we commit ourselves to advancing arguments by which to justify all our claims to the other members. Further, the members of the community of communication (and so, implicitly, all thinking beings) are in my view obligated to take into account all virtual claims of any virtual member; that is, they must take into account all human “needs,” so long as these needs brings into being claims on others.

In Apel’s view, the normativity of these moral norms must be presupposed even in the face of the most radical doubt about moral normativity: Such normativity is therefore grounded.

The link is clear between this argument and Korsgaard’s argument retrospectively reformulated: It is argued in either case that moral normativity is implicitly presupposed even when someone calls it into doubt. And if Apel’s transcendental argument is reframed in an explorational form, the analogy emerges even more clearly. Indeed, according to Apel, those who doubt the possibility of moral normativity contradict themselves because moral normativity is constitutive of argumentation, and argumentation is constitutive of thought and action. Hence, the explorational variant of the argument from

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32 Apel, *Das Apriori* above n 5, 401; my translation.
33 Apel, *Das Apriori* above n 5, 415; my translation.
34 Apel, *Das Apriori* above n 5, 424–425; my translation.
discourse starts out from the universality of argumentation as constitutive of reflective thinking: ‘Even de facto solitary thinkers can only explicate and verify their own argumentation to the extent that they can [...] internalize the dialogue of a potential argumentation community.’\(^{35}\) It is important to note that this kind of reflective thinking is, for Apel, a condition for the possibility of an individual’s self-comprehension (Selbstverständniss) and self-identification (Selbstidentifikation), something very much akin to Korsgaard’s insistence on self-constitution and practical identity. Apel, though, seeks to replace Kant’s transcendental starting point of the unity of self-consciousness with the ‘intersubjective unity of interpretation’, which ‘must in principle be acquired in the unlimited argumentation community.’\(^{36}\) Apel’s next step is to show how, given that argumentation entails the moral norms of the community of critical communication, ‘whoever acts even only meaningfully—whoever, for example, has an alternative and takes a decision, claiming to understand himself or herself in doing so—implicitly presupposes the logical and moral conditions [...] of critical communication.’\(^{37}\) The conclusion is that ‘accepting a basic moral norm [...] is part of the conditions of possibility of any argumentation, and insofar as methodical solipsism can be said to have been refuted, such acceptance forms part of the conditions of possibility of any valid self-understanding.’\(^{38}\)

For Apel, as for Korsgaard, the starting point for this transcendental explorational argument—reflective thinking essentially conceived as argumentation—is justified by way of reflection:

Whoever takes the obscurantist decision can nonetheless understand this decision only by presupposing that which he himself or herself is denying [...], and when he or she takes such a decision in a radical and principled sense, he or she thereby abandons the transcendental community of communication, and in so doing he or

\(^{35}\) Apel, \textit{Das Apriori} above n 5, 399; my translation.

\(^{36}\) Apel, \textit{Das Apriori} above n 5, 411; my translation.

\(^{37}\) Apel, \textit{Das Apriori} above n 5, 414; my translation.

\(^{38}\) Apel, \textit{Das Apriori} above n 5, 416; my translation.
she forsakes the possibility of self-understanding and self-identification. (In speculative and theological terms, this point may be stated by saying that only through an act of self-destruction can the devil become independent from God).\(^{39}\)

According to Apel, this reflective, first-person perspective entails that we, as linguistic agents, cannot but ascertain what is inevitably implied by the pragmatics of our own language. This insistence on pragmatics as an object of philosophical reflection is the reason why Apel often calls his own argument a “transcendental-pragmatic argument” for the ultimate foundation. And it is important to note that in Apel’s view this is intended not only as an argument for moral foundation but also as a confutation of universal fallibilism in the theoretical domain. In his 1973 essay, as well as in many other essays, Apel argues at length that the principle of fallibilism as applied to all theoretical judgments is inconsistent, showing how argumentation must be taken for granted even by fallibilism.\(^{40}\) This leads him to the same conclusion which Korsgaard later comes at, too, namely, that some truths can neither be logically demonstrated nor called into question, because they are presupposed by logical demonstration. Aristotle’s famous elenctic argument, as presented in Book Gamma of The Metaphysics, is clearly the antecedent for such a view, and it is no accident that both Apel and Korsgaard make explicit reference to this argument as an antecedent of their own.\(^{41}\)

4. THE PROBLEMS OF FREEDOM AND OF AUTONOMY

It should emerge from the discussion in Sections 2 and 3 that Apel’s argument from discourse and Korsgaard’s argument from agency are in many respects twin arguments. Both are aimed at grounding moral normativity, and both are

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\(^{39}\) Apel, *Das Apriori* above n 5, 414; my translation.


\(^{41}\) See, for example, Apel’s thorough discussion in *Fallibilismus* above n 40, 172ff. See also Korsgaard, *Self-constitution* above n 15, 79.
transcendental arguments that can be framed in either a retorsive or an explorational form. Both start out from the unavoidability of rationality and agency, and both purport to show that moral normativity is constitutively linked to this starting point. The two arguments do also differ in several respects, however. Thus, Apel’s central concern is the rational structure of language as constitutive of thought, while Korsgaard’s is reflective thinking and autonomous action; Apel insists on the pragmatic structure of argumentation as a transcendental language game, while Korsgaard focuses on the individual process of reason-giving; and on a broader note, it seems that while Apel is more interested in publicness, intersubjectivity, and pragmatic questions, Korsgaard instead lays more emphasis on the autonomy of individuals along with their epistemic capacities.

In this section, I argue that rather than taking the argument from discourse and the argument from agency in different directions, these differences make them interdependent, or complementary. I will illustrate this complementarity by presenting two central objections to these two arguments and discussing how an adequate answer to them makes it necessary to tweak both arguments to the point of making them almost undistinguishable. Given that the argument from discourse and the argument from agency fold into each other in the face of these objections, it is in my view much more accurate to regard them as representing a single theoretical perspective.

According to the argument from discourse, moral norms are constitutively linked to the pragmatics of the transcendental language game of argumentation. This puts moral normativity on a par with the normativity typical of the rules constitutive of assertive speech acts, and in taking this path, the discursive approach risks collapsing moral normativity into semantic normativity. This tendency becomes apparent in the recent book by George Pavlakos titled *Our Knowledge of the Law*, where the argument from discourse is recast in an original way, developing a conception Pavlakos calls ‘pragmatic rationalism’. Like Apel, Pavlakos takes as his starting point the fundamental language game of assertion and argumentation, a game conceived as the practice of giving and
asking for reasons: He calls this game ‘the practice of grammar’.

Pavlakos conceives this practice as the common ground enabling both objectivity and normativity in linguistic rule-following, this because, in his view, all the questions about correctness in linguistic usage ultimately lead to the fundamental practice of assertion and justification. Hence, the practice of grammar is presupposed as a Wittgensteinian “bedrock” where all rational agents stand ab origine: its status is prior to our conceptual operations and provides us with an ultimate and conventional ground for justification, thereby conferring a normative “depth” on all linguistic practices. Pavlakos thus proceeds from the unavoidability of the practice of grammar by showing that this practice presupposes a weak notion of autonomy (conceived as ‘something like the freedom to willingly abide by a normative standard’ and consisting of ‘choice, freedom, responsibility’), the reason being that semantic content, as we have seen, is essentially connected here with justification. If (i) speaking a language means knowing how to make assertions and (ii) knowing how to make assertions is equivalent to knowing how to give reasons—(i) and (ii) being the two pillars of pragmatic rationalism—then, as the argument goes, speaking a language necessarily presupposes the autonomy of linguistic agents. The second step in the argument consists in showing that, just as autonomy conceived as our ability to follow rules is the necessary precondition of the normativity of grammar, so moral autonomy conceived as our ability to hold our will bound to rules is the precondition for the normativity specific to practical reason, a normativity that Pavlakos identifies with that of Kant’s categorical imperative. Hence, from this perspective the value of moral autonomy is grounded in the normativity typical of practical reason, which in its own turn is grounded in the normativity of grammar.

In grounding the normativity of fundamental moral values in the unavoidability of the normative linguistic practice of giving and asking for

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43 Pavlakos, *Our Knowledge* above n 42, 143, 145.

44 See Pavlakos, *Our Knowledge* above n 42, 147–148.
reasons, Pavlakos’s pragmatic rationalism clearly proceeds in synchrony with the argument from discourse, and it takes that idea even further, arguing that argumentative rationality is linked to the normativity of meaning. However, Pavlakos’s greater accuracy in arguing this point throws into even greater relief the problems connected with the approach. There are two distinct problems here, one which I will call the problem of freedom and the other the problem of autonomy.

Let us proceed in that order and start with the problem of freedom, which arises from the idea of normativity as constitutive of language. Consider this idea in light of the paradigmatic example of constitutive rules, that of the rules of chess: Are we free with respect to the rules of chess? The answer to this question, it seems, is that we are free in a sense, but in another we are not. Clearly, we are free to choose whether to play or not. This, however, is freedom we have not with respect to the constitutive rules of chess (the freedom to choose whether or not to follow them) but with respect to the practice of playing in general. This freedom depends on a structural feature of the practice of playing, namely, that this practice essentially consists in our engaging in recreational activities and that in normal circumstances we can choose whether or not to participate. In this broader sense, then, we are free to choose whether or not to play chess. But if I do choose to play chess, I will then be bound by its rules: I will not be free to choose whether to follow its rules—I will not, in Pavlakos’s words, have ‘a range of choices as regards their application.’\(^4\) The rules of chess are constitutive of the game, and this means that if we do not follow them, we are not properly playing chess. The moment we choose to play chess, the game’s constitutive rules will tell us how that is to be done.

Let us now extend this simple observation to the matter of language. On the one hand, we are not free with respect to the rules of grammar, given that they are constitutive of this practice: We cannot choose for ourselves how to make assertions, judgments, or inferences, and in this respect the rules of grammar can be compared to the rules of chess. But on the other hand, a radical

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\(^4\) Pavlakos, *Our Knowledge* above n 42, 143.
difference separates the two: There is a sense in which following the practice of grammar bears no relation to playing a game like chess, for as essentially linguistic agents, we cannot choose to speak a language in the same sense as we can choose to play a game. As Wittgenstein makes clear with his well-known considerations on the “form of life” (*Lebensform*), we are educated *within* a language, and for this reason our conceptual structures are inevitably rooted in it.

When the argument from discourse looks to language as a necessary foundation for normativity, it clearly relies on these observations by Wittgenstein. Apel explicitly uses Wittgenstein’s theory of language games, strengthening it to serve a foundational role, and Pavlakos does the same thing in discussing the practice of grammar. But if the practice of grammar cannot (as a transcendental condition of possibility) be avoided, how can we say we are free with respect to morality? And, if we want to retain moral freedom of choice, how can this constitutive normativity of language, which unavoidably constrains our conceptual operations, be the ground for moral normativity? It seems that the argument from discourse faces here a dilemma. On the one hand, the argument postulates language as an unavoidable, transcendental necessity, something without which we could not find an ultimate foundation for normativity. On the other hand, the argument seeks to derive moral normativity from the constitution of language, were it not that moral normativity is something with respect to which we must be conceived as free agents. So, the argument from discourse must either concede that agents are free with respect to language—but this would contradict the unavoidability of language as a starting point for the argument—or it must concede that agents are not free with regard to the moral norms constitutive of discourse, but then we are left with the question of how we could conceive these norms as moral.

Quite interestingly, this same problem has previously been sensed by another crucial author in discourse ethics, Jürgen Habermas, who unlike Pavlakos maintains that the normativity of language—along with epistemic normativity—is not continuous with moral normativity. Habermas’s point of view on normativity emerges clearly in an essay where he discusses the philosophy of Robert Brandom:
Brandom misunderstands himself to a certain extent because he makes use of an overly inclusive conception of normativity and assimilates norms of rationality in the broadest sense—logical, conceptual and semantic rules as well as pragmatic ones—to norms of action. [...] Being affected by reasons is, however, quite a different matter to being obliged by norms. Whereas norms of action bind the will of agents, norms of rationality—and conceptual norms in general—direct their minds.  

Habermas clearly connects this difference with the question of constitutive rules. In his view, constitutive rules and moral rules entail two entirely different sorts of obligation:

There is no single “deontological” sense of normative obligatoriness. The rules of logic, geometry, and arithmetic; the rules of measurement in physics; the rules of grammar and of linguistic pragmatics serve the production and syntactic order of symbolic objects—signs, figures, numbers, calculations, propositions, argumentations, etc. These rules, broadly understood as conceptual rules, are constitutive of their corresponding practices [Praktiken]. As long as these practices do not refer to anything outside their own praxis [Praxis], any infraction of the rules will have intrinsic consequences only. [...] Nobody punishes us—not our conscience, not society, not nature. On the contrary, social action-norms [Handlungsnormen] have the “deontological” sense of holding their addressees bound to follow the rules in question, and here the kind of sanction depends on the kind of rule (it depends on whether what we break or depart from are moral rules, legal rules, customs, conventions, or social roles).  

As a consequence, Habermas does not think that the moral norms of discourse are constitutive of discourse. In fact, if moral norms were to be conceived as rules constitutive of the transcendental language game of assertion and argumentation, then we could not, in Apel’s words, make an assertion without necessarily ‘taking into account all virtual claims of all virtual members’ in the
community of communication, and that conclusion would seem quite odd. As Habermas clearly states in his essay *Diskursethik*, of 1983, the moral norms of discourse need not be followed in order for an assertion to be successful: It suffices to this end that those participating in argumentation assume these norms to be effective, ‘and it does not matter whether, and if so to what extent, this assumption in any given case is counterfactual.’\(^{48}\) This is an important point, making it clear that the community of communication as represented in the argument from discourse (what Habermas calls the ‘ideal speech situation,’ *ideale Sprechsituation*) is at least partly counterfactual, and so the moral rules of discourse cannot properly be conceived of as constitutive of discourse but only as regulative idealizations by which discourse is governed. Apel, too, often speaks of a dialectical tension between the idealized presuppositions of assertion and their factual concretizations.\(^{49}\)

It follows from these considerations that we cannot, on the argument from discourse, conceive moral rules and values as constitutive in the same sense as the rules of grammar or of speech acts are said to be constitutive. The argument cannot be that a speaker must follow the moral rules of discourse in order to make an assertion, but rather that a speaker must recognize these rules as binding. The practice of discourse, then, is constituted not by our meeting the conditions set forth in the rules of discourse, but rather by these rules’ normativity (by their bindingness rather than their efficacy). Thus, if the moral norms and values grounded through the argument from discourse are not conceived as rules constitutive of the language game of assertion and argumentation, but rather as regulative rules binding the participants in that language game, then the constitutive normativity based on the argument from discourse is not necessarily incompatible with freedom of choice, and the problem of freedom is solved.


\(^{49}\) See, for example Apel, *Das Apriori above n 5, 426ff.*
This clarification, however, does not succeed in defending the argument from discourse from the other previously mentioned problem, that of autonomy. How can the argument from discourse derive the autonomy of moral agents from the essential heteronomy of linguistic practices? If moral normativity stems from language, then it depends on something thrust upon us since birth: Wittgenstein’s *Lebensform*, which the argument from discourse appeals to, does not come from within us but rather surrounds us “from without”. Hence, from this perspective we are not, properly speaking, morally autonomous, because it seems that moral normativity is made here into the outcome of a contingent education within a given language. But, clearly, if we are not autonomous with regard to the sources of moral normativity, then it becomes difficult to understand how the argument from discourse can serve a foundational role for morality, for the question arises as to why we should abide by the moral constitution of something that has simply been imposed on us. There is no evident reason why we should recognize the inner morality of language as binding, given that we recognize language to be simply the outcome of education. From this perspective, constitutive normativity cannot provide an answer to the normative question, because that same question bears on the status of that which is constituted.

The reason why the argument from discourse risks incurring this problem lies in its peculiar insistence on the pragmatics of language. However, the problem can be avoided by framing the argument from discourse so as to link it more closely to Korsgaard’s argument from agency. In Korsgaard’s view, moral normativity stems not from a heteronomous source such as language but from our own constitution as agents. And if normativity stems from our own constitution, then that amounts to saying we are autonomous: Our being autonomous becomes equivalent to recognizing constitutive normativity as binding. According to Korsgaard, agency, unlike language, does not come “from without”: we are agents in the first place. Thus, linking normativity to agency is tantamount to providing a strict definition of autonomy.

Given that the argument from discourse, unlike Korsgaard’s argument from agency, is aimed at conceiving language as the source of normativity, the only way to avoid qualifying normativity as heteronomous is, from this perspective, to challenge the postulate that language comes “from without”, by
maintaining that human agency is essentially and in the first place a linguistic agency. In such a view, the normativity stemming from the language game of assertion and argumentation would not stand on its own but it would be equivalent to the normativity of reason, which is rooted in human agency. Reasons would be conceived as essentially linguistic, and the deep structure of language would be nothing if not an image of the deep structure of rationality. This reframing of the matter, however, reverses the order of explication assumed by the argument from discourse: Here, normativity results not from language but from autonomous and rational agency, which in its own turn is conceived as linguistic agency; and so the argument from discourse becomes an argument from linguistic agency. This argument will be sketched out in greater detail in Section 6.

5. THE PROBLEM OF THE NORMATIVE BRIDGE

Korsgaard’s argument from agency explains in depth why agents must value humanity: They must do so because human identity is the necessary precondition for having a practical identity, and hence for being a unified agent. We cannot treat our practical identity as normative without thereby treating our human identity in the same way.

As Korsgaard knows full well, however, this conclusion is not in itself morally significant. Grounding moral normativity is not a matter of providing a good reason for valuing our own humanity but is rather a matter of giving us a reason for valuing the humanity of others. Why, then, ought we to value other human beings, given that normativity depends exclusively on our own humanity? In The Sources of Normativity, Korsgaard answers this question by appealing to the argument presented in Thomas Nagel’s The Possibility of Altruism (Oxford: Clarendon Press, 1970):

Suppose that we are strangers and that you are tormenting me, and suppose that I call upon you to stop. I say: ‘How would you like it if someone did that to you?’ And now you cannot proceed as you did before. Oh, you can proceed all right, but not just as you did before. For I have obligated you to stop. How does the obligation come about? Just the way Nagel says that it does. I invite you to consider how you would like it if someone did that to you. You realize that you
would not merely dislike it, you would resent it. You would think that the other has a reason to stop, more, that he has an obligation to stop. And that obligation would spring from your own objection to what he does to you. You make yourself an end for others; you make yourself a law to them. But if you are a law to others in so far as you are just human, [...] then the humanity of others is also a law to you.\textsuperscript{50}

As Korsgaard makes clear, ‘there is an appeal to consistency in this argument’, an appeal that can be interpreted as follows. Given that, according to Korsgaard, normativity stems from the conditions for the possibility of our own agency, I can place value on something other than myself only if I am forced by reasons of consistency: I value X \textit{insofar} as I value myself and X is like me. If this reading is correct, moral reasons stem from my giving reasons to myself, and moral normativity is a game that only revolves circularly within me as an agent.

But this account of moral normativity is quite implausible, for it implies that there are no moral agents apart from me. It presupposes an account of the first-person perspective from which I (as a moral agent) find that other persons are capable of prompting in me instances of moral reasoning, but from which I also find that I am the only real source of these reasons. On this view, other persons are not considered moral agents who can put forward reasons, as I can: They are rather a sort of perceptual stimulus holding me to a test of consistency, and it is this internal test of mine that provides moral reasons.\textsuperscript{51}

And here, clearly, scepticism about rule-following can bear its full relevance. The sceptic could ask, for example, What assures me that my application of the consistency tests is in principle the same as that which other agents make? If I have no criterion but my own rule for consistency tests, then there is nothing that can guarantee I will evaluate moral reasons in the same way as other agents do. Thus I could perfectly have a personal morality whose reasons cannot be

\textsuperscript{50} Korsgaard, \textit{Sources} above n 2, 142–143.

exchanged with others. In this view, there would be no intersubjective exchange of moral reasons, but only monadic agents.

This implausible account reveals a fundamental difficulty that Korsgaard’s argument from agency comes up against. I will call it the problem of the normative bridge and will state it as follows: If, according to the argument from agency, the source of moral reasons resides in me, how could other persons be a source of moral reasons for me? And if they cannot be such a source, how can the argument from agency account for moral reasons? How can a personal morality made up of reasons we cannot exchange provide us with genuine moral normativity?

The problem of the normative bridge becomes particularly relevant when the argument from agency is extended to domains where publicness and intersubjectivity of reasons is even more essential than in morality, as in the legal domain. Such an extension can be found in Stefano Bertea’s recent book, *The Normative Claim of Law*, where he develops a ‘modified Kantian account’ for the normativity of practical reason in general, and he argues (explicitly tracing his approach to Korsgaard’s) that the normativity of practical reason can be grounded in a ‘minimally necessary self-conception’ we have as human agents: This conception consists (in Bertea’s own terminology) of reflectivity, rationality, and autonomy. Bertea defends in his theory a unified conception of practical reason, and so he concludes and argues from it that not only moral normativity but also legal normativity must be grounded in the minimally necessary self-conception. Indeed, on his view the ‘structure of human agency affects us in every aspect of our lives, extending its influence to the institutional frameworks in which we participate (including the institutions of the law as manifestations of practical reason). This primacy that the minimally necessary self-conception is found to have over institutions plays a key role in Bertea’s argument, particularly in his seeking to avoid an

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52 See Bertea, *Normative Claim* above n 1, 206.
53 See Bertea, *Normative Claim* above n 1, 174ff.
54 See Bertea, *Normative Claim* above n 1, 227ff.
55 Bertea, *Normative Claim* above n 1, 228.
excessively abstract view of the self. In fact, given that institutions are
grounded in the features of human agency, Bertea can on the one hand concede
that social life shapes our practical identity through institutions, and at the same
time he can defend the view that the ‘essential traits of human agency’ cannot
depend on social factors: ‘This is because the very institutions in which we take
part are governed by practical reason, and so the specific identities we take on
in participating in such institutions supervene, and so are subordinate to, the
identity shaped by the minimally necessary self-conception.’56 The connection
needed between the nature of institutions and the features of human agency is
effected by way of a simple consideration: ‘Institutions are not independent
entities, rather they are the outcome of the interaction that takes place among
those who bring them into being.’57

Now, it is clear that if the argument from agency aims at showing that
institutions can be shaped by human agency, as Bertea’s argument does, it must
solve the problem of the normative bridge. In fact, when extended to the
institutional domain, the test of consistency is an even more tenuous
explanation of how others can prompt reasons in me than in the case of moral
reasons. For if moral reasons stem exclusively from my own arguing within
myself, it is difficult to see how we can have a public exchange of reasons, much
less how institutions can be created that will embody the normativity of
human agency. So if the argument from agency is aimed at concluding that
there exists an entirely public dimension of practical reasons embodied in a
given set of institutions, as Bertea argues, then this argument cannot avoid the
burden of explaining how other people can be a source of such reasons (in
addition to just my being such a source), and how the normativity stemming
from different agents can be pooled together and solidified into something we
can attribute to institutions.

As can be appreciated from the passage quoted at the beginning of this
section, Korsgaard seems to see language as the main conduit through which to
bridge normativity. In a later passage, she states that our recognition of others as human agents (and hence as sources of normativity) depends in some sense on our being capable of linguistic understanding:

[I]t is impossible to hear the words of a language you know as mere noise. In hearing our words as words, I acknowledge that you are someone. I acknowledging that I can hear them, I acknowledge that I am someone. If I listen to the argument at all, I have already admitted that each of us is someone. ⁵⁸

Can language solve the problem of the normative bridge, as Korsgaard seems to suggest? It depends on the conception of language we are dealing with. If the argument from agency appeals to language as a shared way of expressing reasons, then all the argument states is that agents can share semantic rules. From this perspective, normativity would remain an inner process taking place within me as an agent, a process whose result can be expressed in such a way that others can understand it. As Alan Gibbard has noted, however, this solution does not guarantee a sharing of normativity, that is, it does not guarantee that moral reasons can be shared among agents:

Suppose, then, I think of my reasons in my native English, a shared, public language that you too understand. Does this mean that we “share our reasons” [...]?
In one sense, it certainly does: if you think you have reason to enslave me if you can, you can tell me so, if you choose, and if I think I have reason to try to prevent you, then I can tell you that. What morality needs, though, is reasons we share in a different sense: roughly at least, that you have genuine reason to try to enslave me only if I have some reason to submit. (What morality requires more precisely is perhaps, as Korsgaard suggests, an ideal of a “Kingdom of Ends”: that our reasons all feed into a scheme of accommodation that we all have reason, all told, to join.) From our ability to talk together about your reasons and about mine, can we derive reasons we share in this strong sense? ⁵⁹

⁵⁸ Korsgaard, Sources above n 2, 142–143.
But language can play another role in the argument from agency. In *The Sources of Normativity*, Korsgaard very much insists on the inherently public character of reasons by appealing to Wittgenstein’s private language argument. Quite strikingly, however, she uses Wittgenstein’s approach more as an analogy than as an effective instrument, maintaining that practical reasons, *like* language, can be conceived as inherently public: ‘[I]f we have to grant that meanings can be shared, why not grant that practical reasons can be shared too?’[60] Korsgaard’s argument for the relationality of reasons depends not on language but on an essentially relational account of the self’s structure. She argues in particular that reasons are inherently relational because they always involve at least ‘two, a legislator to lay it down, and a citizen to obey,’ and these two she conceives as ‘the two elements of reflective consciousness, the thinking self and the acting self.’[61] But it should be clear that this does not bear on the problem of the normative bridge, because on such a description, the relationality of reasons still involves just me, and no explanation is provided as to how it can be extended to others aside from me. Hence, on this interpretation, Korsgaard does not offer a convincing account of the relationality of reasons.

As mentioned, while Korsgaard finds that the inherently public nature of meaning can be useful in clarifying the relational nature of reasons, she does not provide an argument to connect these two. How, then, is it possible to fill this hiatus? The desired connection can be attempted by reframing the argument from agency so as to link it more closely to the argument from discourse, saying that reasons are inherently linguistic, and that agency must be conceived of as essentially a linguistic agency. On such a view, reflectivity is reinterpreted as a sort of inner argumentation, thinking is conceived as arguing within ourselves by the use of language, and reflective agents are in the first instance argumentative agents. Normativity still comes from me, but its form is

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60 Korsgaard, *Sources* above n 2, 142.

61 Korsgaard, *Sources* above n 2, 138.
inherently linguistic, doing no more than providing argumentative weight, and so reasons can by their nature be shared with others. Wittgenstein’s private language argument is conceived here not as an insightful analogy but as a crucial tool: As long as language cannot be private, and as long as argumentation is the way by which we evaluate reasons within ourselves, linguistic agents are built for an exchange of reasons.

So, just like the argument from discourse, so too must the argument from agency be reframed to address a crucial problem. In fact, it is the inherently linguistic and argumentative nature of reasons which provides the normative bridge the argument from agency needs to account for moral reasons. We find here again (as we saw in the last section) the same argument from linguistic agency that relieved the argument from discourse of the burden of the problem of autonomy.

6. THE ARGUMENT FROM LINGUISTIC AGENCY

We should by now be clear on what the dialectical structure is of the relation between the argument from agency and the argument from discourse. In order for the argument from discourse to answer the problem of autonomy, it must be reframed so as to become a variant of the argument from agency, thus becoming essentially an argument from linguistic agency (the emphasis here falls on agency). Conversely, in order for the argument from agency to answer the problem of the normative bridge, it must be reframed so as to become a variant of the argument from discourse, thus becoming an argument from linguistic agency (the emphasis here falls on linguistic). Hence, when the two arguments are considered in relation to the two aforementioned problems, they must be recast to stand together as a single argument. And this single argument revolves around the concept of linguistic agency.

Let me briefly summarize the features of this argument. The starting point is the same as in Korsgaard’s argument from agency: As human beings, we are self-conscious individuals, capable of evaluating our perceptions and impulses and asking whether they are good reasons for belief and action. However—and this instead draws on the argument from discourse—this process of deliberation is essentially linguistic, in the sense that the balancing of reasons I make within
me is nothing more than an instance of linguistic argumentation. When I balance reasons, I perform speech acts in the language game of assertion and argumentation. We can reflect on and perform actions only if we can give ourselves arguments, and that entails following a definite set of rules. Thus, for example, we recognize the claim to truth that reasons advance and know that this claim must be tested against possible objections; we know that reasons must be justified; and we also know that ignoring a reason does not make it irrelevant. These rules are doubtless normative for us, and the same holds when other agents advance reasons. We do not have any discontinuity here, such as is found in the argument from agency, because the reasons that other agents advance are not any different in nature from the reasons we advance within ourselves: In either case they are linguistic. They carry argumentative weight, just as ours do. And, again, we know that if we want to think and behave rationally with regard to these third-party reasons, we ought to treat them as we treat our own, recognizing they have a claim to truth while not taking that claim for granted, by testing them against reasonable objections and considering possible counter-objections. This time, however, the rules of argumentation, which we recognize as normative within ourselves when thinking, define a mode of behaviour toward others based on the assumption that others are rational human beings like us, because they can offer reasons that do not differ in nature from ours. Hence, the rules of argumentation in this case become moral rules, and we, as linguistic agents, cannot but recognize the normativity of these rules.

So formulated, the argument from linguistic agency seems able to avoid the problem of freedom. In fact, while rationality involves recognizing the rules of argumentation as normative, we are not forced to actually follow these rules when thinking, much less when dealing with others. We can behave and think as irrational agents, and we can choose to behave irrationally toward others as well. We could call this the “communicative choice”, and it is something with respect to which we are free.

The argument from linguistic agency seems not to fall subject to the problem of autonomy, either. In fact, the normativity of the rules of argumentation does not stem here from the pragmatics of language conceived as something coming “from without” and thrust upon us since birth. We are
linguistic agents: That is our constitution. The normativity of the rules of argumentation thus structures our rationality, and so it comes from within us. We are perfectly autonomous with respect to it.

Finally, the argument from linguistic agency seems able to solve the problem of the normative bridge. In fact, the linguistic nature of our reasons makes it so that the process through which we evaluate our own reasons and the process through which we evaluate the reasons of others are one and the same process—that of argumentation. On this view, no normative bridge is needed to communicate rationally with others, or to respect them as humans capable of argumentation.

It is unclear whether the authors who have supported the argument from discourse and the argument from agency could accept such a recasting of their two arguments in the form of the argument from linguistic agency. On the one hand, it is quite clear that Apel’s and Habermas’s insistence on pragmatics as the essential dimension of language is owed to their belief that linguistic actions are a fundamental form of action. But would they accept that all rational thinking and action ultimately resolves itself into linguistic action revealing a normative moral dimension, a kind of argumentation? Some passages by Apel seems to confirm such a view. In his seminal essay of 1973, for example, Apel says that ‘all linguistic manifestations and, more than that, all meaningful actions and physical expressions of human beings (insofar as they can be verbalized) can be conceived as virtual arguments,’ and then he adds this comment in a footnote:

One can interpret in this sense Wittgenstein’s idea of the “connection” between linguistic manifestations, actions, and physical expressions. Moreover, the thesis that all actions and expressive gestures can in principle be verbalized is suggested by Austin’s discovery of “performative expressions” and by its generalization and radicalization in J. R. Searle’s theory of “speech acts” (emphasis added).62

It clearly emerges from this passage that Apel is casting Austin’s and Searle’s pragmatics as a general theory of action and rationality. And a very similar

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62 Apel, Das Apriori above n 5, 400; my translation.
Pragmatic rationalism [...] is the idea that there are deep standards (reasons) of cognition and action which, however, are embedded within our practices of judging. [...] Given that pragmatic rationalism adduces the foundational level of judging, i.e., grammar, with an eye to explaining the deep structure of content, it follows that the property of being a priori must be ascribed to the rules of grammar. 63

Grammar is conceived by Pavlakos as fundamental with respect to any meaningful thought and action, both conceived as essentially an instance of rule-following: ‘In contrast to other conceptions of rule-following, the pragmatic view steers away from a relapse into dualism by enjoining the fundamental character of practice with respect to thought and action.’ 64

As regards Korsgaard, there are passages where she seems to support a view similar to that advocated by the argument from linguistic agency, as when, in answer to the question ‘Why shouldn’t language force us to reason practically together, in just the same way as it forces us to think together?’ 65 she concludes with this remark:

Human beings are a social animal in a deep way. It is not just that we go in for friendship or prefer to live in swarms or packs. The space of linguistic consciousness—the space in which meanings and reasons exist—is a space that we occupy together (emphasis added). 66

My impression, however, is that Korsgaard does not intend to commit to the view that reasons are inherently linguistic. The impression is reinforced on reading her recent Self-constitution, where she discusses at length the

63 Pavlakos, Our Knowledge above n 42, 153.
64 Pavlakos, Our Knowledge above n 42, 152.
65 Korsgaard, Sources above n 2, 142.
66 Korsgaard, Sources above n 2, 145.
interaction and the publicness of reasons as necessary features of the self. But she still considers the appeal to Wittgenstein’s private-game argument as no more than an analogy, and in commenting the use she made of this argument in *The Sources of Normativity*, she writes:

Many readers have a misimpression about how I intended that argument to go. I did not intend to suggest that the publicity of reasons can be *inferred from* the publicity of meanings. I meant rather to be making an argument from the publicity of reason that is analogous to Wittgenstein’s argument for the publicity of meaning. Wittgenstein’s argument, as I understand it, is intended to show that meaning can’t be normative at all […] unless it is public. My argument was meant to show that reasons cannot be normative at all unless they are public.\(^{67}\)

Moreover, when Korsgaard argues that ‘action is simply interaction with the self,’\(^{68}\) a view quite close to that taken by the argument from linguistic agency, she also maintains that ‘the requirements for unifying your agency internally are the same as the requirements for unifying your agency with that of others,’\(^{69}\) but she does not explicitly identify such requirements with language and argumentation.

In any event, I do not intend to enter into interpretive questions, because my concern is rather theoretical. The argument from linguistic agency, obtained by merging the argument from discourse and the argument from agency, seems to respond to important objections better than the two original ones. Hence, those two arguments, which are often treated and discussed separately as two distinct Kantian approaches to normativity, should instead be conceived as a single argument revolving around the necessary linguistic and argumentative nature of human agency and rationality.

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\(^{67}\) Korsgaard, *Self-constitution* above n 15, 196 n 12.

\(^{68}\) Korsgaard, *Self-constitution* above n 15, 204.

\(^{69}\) Korsgaard, *Self-constitution* above n 15, 202.
7. TWO FURTHER PROBLEMS: UNAVOIDABILITY AND NORMATIVE REGRESS

As much as the argument from linguistic agency may fare better than its two constituents separately considered, it cannot address all the charges that may be levelled against them. There are at least two other problems with respect to which this argument meets the same difficulties as the constituent arguments from agency and from discourse. In fact, these problems concern these arguments’ transcendental structure, a structure they all share.

I will first discuss what I will call the problem of unavoidability, which is quite straightforward: Is the starting point of the arguments from discourse and from agency really unavoidable? It could be argued, for example, that rationality and argumentation represent for human beings not so much an unavoidable perspective as one dependent on social, external, or in any event contingent conditions. True, if you are a rational agent, the moral norms implicit in argumentation will be binding on you—but rational agency need not be a necessary status.

This is a classic objection, and we have already seen how Apel and Korsgaard reply to it, arguing that rationality, reflectivity, and argumentation are clearly unavoidable because they are presupposed from the start even by the sceptic who doubts them (recall Apel’s passage where he says ‘that only through an act of self-destruction can the devil become independent from God’). But this appeal to the presuppositions of the sceptical doubt cannot count as conclusive. As David Enoch has made clear, this answer presupposes a specific conception of scepticism and its role in philosophy:

Skeptical challenges—one, at least, including the ones relevant here—are best seen, I think, as highlighting tensions within our own commitments, as paradoxes arguing for an unacceptable conclusion from premises we endorse, employing rules of inference to which we are committed. [...] The philosophical challenge is not to defeat a real person who advocates the skeptical view or occupies the skeptical position (what view or position?) but, rather, to solve the paradox, to show how we can avoid the unacceptable conclusion at an acceptable price. If we must think of
the situation in dialectical terms, we should think of skeptical challenges as ad
hominem arguments, with all of us as the relevant hominē.\footnote{Enoch, \textit{Agency} above n 1, 183–84.}

We need not agree with Enoch to see that there is a specific conception of
skepticism implicit in Apel’s and Korsgaard’s retorsive arguments against
skepticism about the primacy of reflection and argumentation. And that
conception must be argued for by recourse to nonreflective arguments.

What I want to stress here is that the argument from linguistic agency does
not, for its part, give us much more to go on in the way of a solution out of this
quandary: It similarly assumes that the unavoidability of linguistic agency can
be demonstrated by reflectively refuting skepticism about it, and so it cannot do
much more than the arguments from agency and from discourse vis-à-vis the
problem of unavoidability. It might be said that the coupling of discourse with
agency does put the argument from linguistic agency in a better position to
show the primacy and unavoidability of its starting point as compared with
what the argument from discourse alone can do. But it is highly debatable
whether linguistic agency can offer in this regard better arguments than simple
agency.

Still, the problem of unavoidability is not so devastating as it seems. In
fact, even if we were forced to concede that argumentative rationality is not an
unavoidable necessity, we could still plausibly argue, as Robert Alexy does, for
example, that linguistic agency conceived as argumentation is ‘the most general
form of life of human beings.’\footnote{R Alexy, “Discourse Theory and Human Rights,” \textit{Ratio Juris} 9 (1996) 217.} This would lead to a sort of “weak”
transcendental approach similar to that defended, for example, by Jürgen
Habermas.\footnote{See Habermas, \textit{Diskursethik} above n 48, 105ff.} This strategy would have us replace the ultimate moral foundation
with foundation relative to linguistic agency, and as much as it would wind up
weakening the original transcendental approach, it would nonetheless make for
an impressive philosophical result.
But there is yet another problem to which the argument from linguistic agency does not provide anything new as compared with the two arguments it derives from, and this problem can have more serious consequences than that of unavoidability. I will call this the problem of normative regress and set it up as follows. Let us concede that agency, or discourse, is unavoidable for me as a rational agent, and let us also agree that there are rules whose normativity is constitutive of agency, or of discourse. With these two premises, from my first-person perspective as an agent I cannot but recognize constitutive normativity to be binding. But the point of view from which the arguments from agency and discourse are put forward—the point of view from which constitutive normativity is analyzed—is not that of an agent’s first-person perspective. Indeed, if normativity is to be grounded in us as constitutive of agency or discourse, a different perspective is required whereby the sources of normativity are analyzed objectively, as it were, rather than from an agent’s first-person perspective. In fact, from an agent’s perspective, constitutive normativity simply appears as immediately grounded ab origine, while the arguments from agency and from discourse view it as grounded because constitutive, and that entails analyzing agency and discourse as objects whose constitution can be viewed from the outside.

Let us concede that a similar perspective is possible. What matters here is that if this external perspective is possible for the arguments from agency and from discourse, then so is it possible for those who object to these arguments. And here the problem of normative regress arises. In fact, if I can come to know from an external perspective that something is normative for me because constitutive of my agency or of discourse, why then should I conclude that such a constitutive role is sufficient for me to recognize normativity as binding? I could simply reframe my question and ask, Why am I obligated to “bow” to agency or to discourse? In fact, why should I accept the constitution of agency and discourse as normative?

The point can be illustrated by going back to the ever-present example of chess. The rules of chess are binding for those who are willing to play chess. Playing chess is something we can do only on the condition of respecting the trust our opponents place in our not cheating, but we are bound to that respect only if we want to play chess with them. In this sense, constitutive normativity
is normally conditioned, in that constitutive rules are normative only for those committed to the practice so constituted. Now, let me extend this simple consideration to the arguments from agency and from discourse. It could be argued that, just as in the case of chess, the constitutive normativity these arguments derive is relative to that which is constituted—it is relative to agency or discourse—and hence that no ultimate normative foundation can be established by way of constitutive normativity if the constituted practices are not already grounded in their own turn. This problem is illustrated by Enoch as follows:

If a constitutive-aim or constitutive-motives theory is going to work for agency, then, it is not sufficient to show that some aims or motives or capacities are constitutive of agency. Rather, it is also necessary to show that the “game” of agency is one we have reason to play [...].

Clearly, it is not a straightforward parallel that can be set up between discourse and agency, on the one hand, and chess, on the other, since a fundamental difference intervenes between them. Chess is a practice we can willingly enter into and get out of, while the arguments from agency and from discourse are premised, as we have seen, on the basic point that that agency and discourse are not optional: Our status as rational agents is not, according to Korsgaard and Apel, something we can properly choose to have. Indeed, even if we decide to weaken these arguments in accord with the problem of unavoidability, conceding that agency and argumentation are not unavoidable, we will still have to recognize that they are much more fundamental than contingent practices such as chess, at least insofar as the consequences of forsaking agency or discourse are much more serious than, say, those of choosing to play bridge rather than chess.

But does this difference make irrelevant the problem of normative regress? This is a debated question. Thus, for example, in The Possibility of Practical Reason, of 2000, Richard Velleman discusses a variant of the argument from agency similar in many respects to Korsgaard’s, and he

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73 Enoch, Agency above n 1, 186.
recognizes that agency and reflection are unavoidable when asking for reasons to commit to them:

There may be, in some sense, an open question whether to be an agent, whether to get into or stay in the agency game. But of course someone who is not already in the game is in no position to entertain that question, because entertaining it entails thinking about what to do, which entails trying to bring his behavior under descriptions that would embody knowledge of what he was doing. Anyone who asks himself whether to get into the agency game is already in the game; and anyone who asks himself whether to stay in the game cannot answer in the negative without staying in it at least that far. Of course, such a person can leave the game in a final exercise of agency – say, by taking drugs or jumping off a bridge or just dozing off for a while. But reasons for someone to act are not reasons for him to start or continue functioning as an agent; they are reasons for him in so long and so far as he functions as such. 74

But Velleman also recognizes that such unavoidability is not sufficient to provide normative reasons for action:

Yet the agent's inability to withdraw from his intellectual drives does not entail that he must approve of them, and it certainly does not entail that he must approve of them as that by appeal to which considerations qualify as reasons for acting. Even if the agent is inextricably identified with these drives, what gives them rational authority as opposed to brute motivational force? 75

What, then, are we to make of such an agent who is, so to speak, “captive” to agency? Can we really conceive of agents (or, to use Enoch’s coinage, of “shmagents”) who accept that normativity is constitutive of their structure as agents and yet do not accept agency as a source of reasons? Is the problem of normative regress a genuine problem? According to Enoch, shmagents can exist in the same sense as alienated participants can exist in any practice:

75 Velleman, Replies above n 74, 293.
Think again about finding yourself playing a game of chess, and assume for now that for some reason you cannot quit—not that you should not quit but that you cannot quit. And assume that sacrificing a pawn is the thing you have most chess-related reason to do (it best promotes your chances of checkmating your opponent or some such). Well, do you have a reason to sacrifice a pawn? Not, it seems to me, if you don’t have a normative reason to play or win the game, and this even if you can’t quit. For you can continue playing or “going through the motions,” grudgingly, refusing to internalize the aims of the game. And absent some normative reason to play the game, there need be nothing irrational about such an attitude.  

Other authors, such as Luca Ferrero, do not agree with Enoch’s analysis. In Ferrero’s view, “[a]lienated participation in ordinary enterprises is a genuine possibility but not one that can be used to show that there is a problem with constitutivism.” Ferrero finds Enoch’s example of the “grudging chess-player” to be miscast, because while we could conceivably not internalize the aim of chess and hence play grudgingly, if we consider ourselves captive to agency we necessarily must already have internalized reflectivity and the aim of agency. And in discussing Enoch’s example of the shmagent, Ferrero comments as follows:

The idea of a “shmagent” is introduced by Enoch to show that there might be subjects who are indifferent to agency and would therefore need a reason available outside of agency to be convinced to take part in it. The inescapability of agency, however, shows that there is no standpoint external to agency that the shmagent could occupy and from whence he could launch his challenge.

But it seems to me (let me stress this point again) that such a defence of the argument from agency is inconsistent with one of its fundamental presuppositions. Indeed, as was noted earlier, it is only from a “standpoint external to agency” (in Ferrero’s words) that normativity can be shown to be

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76 Enoch, *Agency* above n 1, 189.
77 Ferrero, *Constitutivism* above n 1, 313.
78 Ferrero, *Constitutivism* above n 1, 311.
grounded as constitutive of agency, and then the question arises as to why this standpoint should be possible only for those who support constitutive normativity and not also for those who reject it.

I do not pretend the problem of normative regress to be a conclusive argument against constitutivism. I should only like to point out, instead, that there is not much more the argument from linguistic agency can bring in by way of a solution to the problem. In fact, shmagency and linguistic shmagency are not essentially different when it comes to the question of their possibility. The arguments for the impossibility of shmagency could be weakened, if at all, by recasting them as arguments for the impossibility of linguistic shmagency; conversely, if shmagency can be conceived as a possibility, I see no reason why linguistic shmagency should not also be so conceived. The reason why the arguments from agency and from discourse necessarily come up against the problem of normative regress even when reframed in terms of linguistic agency is that this problem points up an apparent inconsistency of them. Both arguments invoke the first-person perspective to solve the normative question, but they also invoke a sort of “bird’s eye view” over the structure of agency and of discourse.

The inconsistency could be worked out if the arguments from agency and from discourse managed to explain how the constitution of something can be fully analyzed from within. This task seems particularly difficult where constitutive normativity is concerned because this normativity holds itself out as an answer to the normative question. According to this answer, agents should consider constitutive normativity as binding because they see it from within, in that they are that which is constituted. But if the perspective from which they consider constitutive normativity as binding is the same as that from which they can realize that this normativity is binding because constitutive of them, then it seems that normative bindingness can be relativized. And, if they can do so from within, then the arguments from discourse and from agency do not yield an ultimate answer to the normative question.