In People v. Dueñas, the Second District, Division 7, held that due process requires that restitution fines be subject to an “ability to pay” hearing.[[1]](#footnote-1) Direct restitution was not at issue in *Dueñas*, only fines.[[2]](#footnote-2)

The case involved a homeless probationer, Velia Dueñas, who suffered from cerebral palsy, was unable to work, and received public assistance.[[3]](#footnote-3) Dueñas was convicted of a series of misdemeanor offenses for driving with a suspended license, and in each case was given the impossible choice whether to pay mandatory fees and fines which she could not afford or go to jail.[[4]](#footnote-4) In the order on appeal and at issue, Dueñas was ordered to pay $220, $150 of which was a restitution fine that the judge told Dueñas he could not waive because her situation lacked the “compelling and extraordinary reasons” required by statute.[[5]](#footnote-5)

The appellate court applied a due process inquiry that relied primarily on three cases: Bearden v. Georgia,[[6]](#footnote-6) Griffin v. Illinois,[[7]](#footnote-7) and In re Antazo.[[8]](#footnote-8) Citing *Bearden*, the court states that the due process inquiry depends on whether it is “fundamentally unfair” to use the criminal justice system to impose punitive burdens on probationers who have “made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of [their] own.”[[9]](#footnote-9) Citing *Griffin*, the court stated that due process and equal protection require that a statute may not further invidious discrimination.[[10]](#footnote-10)And citing *Antazo*, the court stated that a state may not inflict punishment on indigent convicted criminal defendants solely on the basis of their poverty.[[11]](#footnote-11)

Applying these, cases in what the court called *Griffin*-*Antazo*-*Bearden* analysis, the court held that the imposition of unpayable fines on indigent defendants was not just unfair, but served no rational purpose, failed to further legislative intent, and was counterproductive.[[12]](#footnote-12) The court determined section 1202.4 punished indigent defendants in a way that it does not punish wealthy defendants, who could successfully complete the terms of their probation and obtain relief from the conviction, charges, penalties, and disabilities of the offense.[[13]](#footnote-13) As a result, the court held that due process requires that any restitution fine imposed under section 1202.4 is subject to an ability to pay hearing despite statutory language barring that consideration.[[14]](#footnote-14)

*Dueñas* immediately came under fire after its publication in January 2019. Several cases since then criticized the due process analysis and declined to extend its ruling on ability to pay fines and fees to ability to pay direct restitution. Three are summarized here.

In a concurrence to People v. Gutierrez published five months later, Justice Benke argued that the reasoning in *Dueñas* was fundamentally flawed. She first criticized the opinion for cherry picking ambiguous language from section 1202.4 while omitting mandatory language like “defendant’s inability to pay shall not be considered” and “compelling and extraordinary.”[[15]](#footnote-15) Second, she challenged *Dueñas*’s reliance on *Griffin*. Justice Benke found “no general due process and equal protection authority which requires a court to conduct a preassessment present ability-to-pay hearing before imposing any fine or fee on a defendant, as Dueñas seems to conclude.”[[16]](#footnote-16) Third, she argued that the fines and fees were best analyzed under the Eighth Amendment.[[17]](#footnote-17)

In its opinion for People v. Hicks, published in September 2019, the Second District, Division 2, wrote that *Dueñas* was an incorrect and expansive interpretation of due process that granted criminal defendants a protection not conferred by either of due processes foundational pillars.[[18]](#footnote-18) It further argued that *Dueñas* was not properly a matter of due process because fines or fees did not bar access to the courts or lead to increased jail time.[[19]](#footnote-19)

People v. Evans, also published in September 2019, did not disagree with *Dueñas*, but it explicitly chose to not extend the due process rights for fines to direct restitution.[[20]](#footnote-20) The court reasoned that direct restitution is not meant to either “raise funds nor to punish a defendant; it ‘is to reimburse the victim for economic losses caused by the defendant's criminal conduct, i.e., to make the victim reasonably whole.’”[[21]](#footnote-21) The court further held that even though the victim had received compensation through the CalVCB, the defendant had to pay the restitution to the Restitution Fund.[[22]](#footnote-22)

## *Kopp* and *Cowan*: An Excessive Fines Argument

In People v. Kopp, published in July 2019, the Fourth District, Division 1, held that a defendant has a right to an ability to pay hearing.[[23]](#footnote-23) But it took a different route than *Dueñas*, instead holding that the right was guaranteed under the excessive fines clauses of the Eighth Amendment and Article 1 of the California Constitution.[[24]](#footnote-24)

The *Kopp* court started by urging caution in applying *Dueñas*, a case about an indigent, homeless, mother of two on public aid, to defendants who don’t show that same reliance on public aid or don’t appear to be trapped in an extreme cycle of debt as sympathetic as the one in *Dueñas*.

The court applied United States v. Bajakajian, where the Supreme Court stated that “the touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality.”[[25]](#footnote-25) The *Kopp* court considered the four factors from *Bajakajian*: (1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay, which the California Supreme Court adopted in.[[26]](#footnote-26) Noting the fourth *Bajakajian* element, the *Kopp* court remanded to the superior court to challenge their punitive fines.[[27]](#footnote-27)

In *People v. Cowan*, published in March 2020, the First District, Division 4 ruled like in *Kopp* that fines and fees were subject to an ability to pay hearing.[[28]](#footnote-28) In its decision, the court expanded on two important matters: determination of what qualifies as “fines” for the Eighth Amendment and Article 1 of the California Constitution, and the importance of ability to pay in determining the excessiveness of the fine.[[29]](#footnote-29)

First, the court considered when restitution fines and assessments qualify as fines. The court rejected the two-step *Ward*/*Mendoza-Martinez* analysis for evaluating what is a fine,[[30]](#footnote-30) which it characterized as overly complex.[[31]](#footnote-31) The court instead elected to used Austin v. United States.[[32]](#footnote-32) Under *Austin*, a civil or criminal monetary sanction is subject to scrutiny under the Eighth Amendment if it serves in part to punish, even if it also serves a remedial purpose.[[33]](#footnote-33) In applying *Austin*, the court held that restitution fines, court facilities, and court operations assessments are all “fines” for purposes of the excessive fines prohibitions in the federal and state Constitutions.[[34]](#footnote-34)

Second, the court expanded *Kopp’s* analysis of ability to pay under *Bajakajian*. The *Cowan* court first noted that the Supreme Court left as an open question in *Bajakajian* whether “wealth or income are relevant to the proportionality determination” or whether a deprivation of one's livelihood may bear on the Eighth Amendment excessiveness analysis.[[35]](#footnote-35) The court found it apparent from *Lockyer* that California adopted a broad reading of *Bajakajian* in which ability to pay must be taken into account as a factor bearing on proportionality.[[36]](#footnote-36)

Kopp and Cowan are now under review in a consolidated case by the California Supreme Court. The questions presented are:

(1) Must a court consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments? (2) If so, which party bears the burden of proof regarding the defendant’s inability to pay?[[37]](#footnote-37)

Like *Dueñas*, these questions only concern fines and fees. Ability to pay is not being considered for direct restitution.

…

The Supreme Court also found restitution punitive in a decision ruling that it is not dischargeable under bankruptcy (see **Section II.D.1**). In Kelly v. Robinson, the Court wrote that while fines, penalties, or forfeitures are normally dischargeable, there is a “broad exception for all penal sanctions” because the “decision to impose restitution generally does not turn on the victim's injury, but on the penal goals of the State and the situation of the defendant.”[[38]](#footnote-38) In adopting *Kelly*, a California appellate court wrote in People v. Moser:

Although restitution does resemble a judgment for the benefit of the victim, the context in which it is imposed undermines that conclusion. . . Moreover, the decision to impose restitution generally does not turn on the victim's injury, but on ***the penal goals of the State*** and the situation of the defendant . . . we conclude that ***restitution orders imposed in such proceedings operate for the benefit of the State***. Similarly, ***they are not assessed for compensation of the victim***. The sentence following a criminal conviction necessarily considers the penal and rehabilitative interests of the State.[[39]](#footnote-39)

Courts have also reasoned that the secondary goals of direct restitution include rehabilitation of the defendant and deterrence of future criminality.[[40]](#footnote-40) This rationale flatly contradicts claims that restitution is not intended to be punitive. The claims allow the state to have its cake and eat it too: restitution is punitive when the classification benefits the state (e.g., discharging under bankruptcy) but not in constitutional analysis that would grant rights to the offender.

The Supreme Court also equated restitution to fines in its Fourteenth Amendment analysis in *Bearden*. The Court wrote: “if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.”[[41]](#footnote-41)

### Direct Restitution Can be Excessive

California appellate courts consider defendant’s ability to pay in considerations of whether a fine is excessive. The second prong of the excessive fine analysis is determining if the ordered restitution is excessive. The starting point for analysis is United States v. Bajakajian, where the Supreme Court held that a $357,144 forfeiture for the federal offense of taking more than $10,000 in currency through customs without reporting it was “grossly disproportional to the gravity of a defendant's offense” and thus unconstitutionally excessive.[[42]](#footnote-42)

The *Bajakajian* court left open the question of whether the deprivation of defendant's livelihood or their wealth are factors in an excessiveness analysis.[[43]](#footnote-43) In its interpretation of *Bajakajian*, the California Supreme Court determined that there were four factors considerations for excessiveness: “(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) **the defendant's ability to pay**.”[[44]](#footnote-44)

As the California Supreme Court reviews excessiveness of fines in *Kopp*, it will have an opportunity to reaffirm that ability to pay is a consideration in excessiveness. Whatever analysis is adopted for restitution fines can then be extended to direct restitution, which is often orders of magnitude higher than restitution fines.

1. 30 Cal. App. 5th 1157. [↑](#footnote-ref-1)
2. *Id.* at 1169. [↑](#footnote-ref-2)
3. *Id.* at 1160-61. [↑](#footnote-ref-3)
4. *Id.* at 1161. [↑](#footnote-ref-4)
5. *Id.* at 1163. [↑](#footnote-ref-5)
6. 461 U.S. 660 (1983). [↑](#footnote-ref-6)
7. 351 U.S. 12 (1956). [↑](#footnote-ref-7)
8. 3 Cal. 3d 100 (1970). [↑](#footnote-ref-8)
9. *Dueñas*, 30 Cal. App. 5th at 1171, (quoting *Bearden*, 461 U.S. at 668) [↑](#footnote-ref-9)
10. *Id.* at 1166, (citing *Griffin*, 351 U.S. at 17). [↑](#footnote-ref-10)
11. *Id.* at 1166, (citing *Antazo*, 3 Cal. 3d 100). [↑](#footnote-ref-11)
12. *Id.* at 1167. [↑](#footnote-ref-12)
13. *Id.* at 1170. [↑](#footnote-ref-13)
14. *Id.* at 1164. [↑](#footnote-ref-14)
15. 35 Cal. App. 5th 1027, 1038 (2019) (quoting Cal. Pen. Code 1202.4(c)). [↑](#footnote-ref-15)
16. *Id.* at 1039. [↑](#footnote-ref-16)
17. *Id.* at 1040. [↑](#footnote-ref-17)
18. 40 Cal. App. 5th 320, 327 (2019). [↑](#footnote-ref-18)
19. *Id.* at 326. [↑](#footnote-ref-19)
20. 39 Cal. App. 5th 771 review denied (Dec. 11, 2019). [↑](#footnote-ref-20)
21. *Id.* at 777 (quoting People v. Holman, 214 Cal. App. 4th 1438, 1451 (2013)). [↑](#footnote-ref-21)
22. *Id.* at 778. [↑](#footnote-ref-22)
23. 38 Cal. App. 5th 47 (2019). [↑](#footnote-ref-23)
24. *Id.* at 96-98. [↑](#footnote-ref-24)
25. *Id.* at 97 (quoting *U.S. v. Bajakajian*, 524 U.S. 321, 334). [↑](#footnote-ref-25)
26. *Id.* (citing *Bajakajian*, 524 U.S. at 337-38); *accord* People ex rel. Lockyer v. R.J. Reynolds Tobacco Co (*Lockyer*) 37 Cal. 4th 707 (2005), as modified (Jan. 18, 2006). [↑](#footnote-ref-26)
27. *Kopp*, 38 Cal. App. 5th at 98. [↑](#footnote-ref-27)
28. 47 Cal. App. 5th 32, 42 (2020). [↑](#footnote-ref-28)
29. *Id.* at 43, 45. [↑](#footnote-ref-29)
30. United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). [↑](#footnote-ref-30)
31. *Cowan*, 47 Cal. App. 5th at 44. [↑](#footnote-ref-31)
32. 509 U.S. 602 (1993). [↑](#footnote-ref-32)
33. Cowan, 47 Cal. App. 5th at 44-45 (2020). [↑](#footnote-ref-33)
34. *Id.* at 46. [↑](#footnote-ref-34)
35. *Id.* (quoting Bajakajian, 524 U.S. at 340 n.15). [↑](#footnote-ref-35)
36. *Id.* at 48. [↑](#footnote-ref-36)
37. People v. Kopp, 451 P.3d 776 (Cal. 2019); People v. Cowan, 466 P.3d 843 (Cal. 2020). [↑](#footnote-ref-37)
38. 479 U.S. 36, 51-52 (1986). [↑](#footnote-ref-38)
39. People v. Moser, 50 Cal. App. 4th 130, 134 (1996) (internal quotations removed, emphasis added). [↑](#footnote-ref-39)
40. People v. Holman, 214 Cal. App. 4th 1438, 1452 (2013); People v. Jennings 128 Cal. App. 4th 42, 57 (2005). [↑](#footnote-ref-40)
41. Bearden v. Georgia, 461 U.S. 660, 667-68 (1983). [↑](#footnote-ref-41)
42. 524 U.S. at 324. [↑](#footnote-ref-42)
43. *Id.* at 340 n.15. [↑](#footnote-ref-43)
44. People ex rel. Lockyer v. R.J. Reynolds Tobacco Co., 37 Cal. 4th 707, 728 (2005), as modified (Jan. 18, 2006). [↑](#footnote-ref-44)