temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling States from giving effect to altered beliefs and responding to changed social conditions.'" [136]

In *Coker v. Georgia*,[137] the Court held that the state may not impose a death sentence upon a rapist who did not take a human life. In *Kennedy v. Louisiana*,[138] the Court held that this was true even when the rape victim was a child.[139] In *Coker* the Court announced that the standard under the Eighth Amendment was that punishments are barred when they "are 'excessive' in relation to the crime committed. Under *Gregg*, a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted." [140] Although the Court thought that the death penalty for rape passed the first test ("it may measurably serve the legitimate ends of punishment"),[141] it found that it failed the second test (proportionality). Georgia was the sole state providing for death for the rape of an adult woman, and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of the

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[136] 128 S. Ct. at 2675 (Alito, J., dissenting) (quoting Harmelin v. Michigan, 501 U.S. 957, 990 (1991)).

[137] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is *per se* invalid, id. at 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id. at 601. Chief Justice Burger and Justice Rehnquist dissented. Id. at 604.

[138] 128 S. Ct. 2641 (2008). Justice Kennedy's opinion was joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justices Scalia and Thomas joined.

[139] The Court noted, however, that "[o]ur concern here is limited to crimes against individual persons [where a victim's life is not taken]. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State." 128 S. Ct. at 2659.

[140] 433 U.S. at 592.

[141] 433 U.S. at 593 n.4.