vating sentencing factors by judges when imposing capital punishment.[1126] These holdings are subject to at least one exception, however,[1127] and the decisions might be evaded by legislatures revising criminal provisions to increase maximum penalties, and then providing for mitigating factors within the newly established sentencing range.

Another closely related issue is statutory presumptions, where proof of a "presumed fact" that is a required element of a crime, is established by another fact, the "basic fact."[1128] In *Tot v. United States*,[1129] the Court held that a statutory presumption was valid under the Due Process Clause only if it met a "rational connection" test. In that case, the Court struck down a presumption that a person possessing an illegal firearm had shipped, transported, or received such in interstate commerce. "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience."

In *Leary v. United States*,[1130] this due process test was stiffened to require that, for such a "rational connection" to exist, it must "at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Thus, the Court voided a provision that permitted a jury to infer from a defendant's possession of marijuana his knowledge of its illegal importation. A lengthy canvass of factual materials established to the Court's satisfaction that, although the

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[1126] Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[1127] This limiting principle does not apply to sentencing enhancements based on recidivism. *Apprendi*, 530 U.S. at 490. As enhancement of sentences for repeat offenders is traditionally considered a part of sentencing, establishing the existence of previous valid convictions may be made by a judge, despite its resulting in a significant increase in the maximum sentence available. Almendarez-Torres v. United States, 523 U.S. 224 (1998) (deported alien reentering the United States subject to a maximum sentence of two years, but upon proof of felony record, is subject to a maximum of twenty years). *See also* Parke v. Raley, 506 U.S. 20 (1992) (where prosecutor has burden of establishing a prior conviction, a defendant can be required to bear the burden of challenging the validity of such a conviction).

[1128] *See*, *e.g.*, Yee Hem v. United States, 268 U.S. 178 (1925) (upholding statute that proscribed possession of smoking opium that had been illegally imported and authorized jury to presume illegal importation from fact of possession); Manley v. Georgia, 279 U.S. 1 (1929) (invalidating statutory presumption that every insolvency of a bank shall be deemed fraudulent).

[1129] 319 U.S. 463, 467–68 (1943). *Compare* United States v. Gainey, 380 U.S. 63 (1965) (upholding presumption from presence at site of illegal still that defendant was "carrying on" or aiding in "carrying on" its operation), *with* United States v. Romano, 382 U.S. 136 (1965) (voiding presumption from presence at site of illegal still that defendant had possession, custody, or control of still).

[1130] 395 U.S. 6, 36 (1969).