Court has not clearly explained, however, is how all these warrantless searches are consistent with its so-called warrant requirement.

It is no answer to point out that most of these searches are designed to enforce not "criminal" but "civil" laws — safety codes, pollution laws, and the like. The text of the Amendment applies equally to both civil and criminal law.[45] The unsupported idea that the "core" of the Amendment is somehow uniquely or specially concerned with criminal law is simply an unfortunate artifact of the equally unsupported exclusionary rule. If two searches are equally unintrusive to the target, why should the criminal search be more severely restricted than the civil search — especially if the target is not herself a suspect, but merely, say, an innocent possessor of evidence?[46] In any event, aren't metal detectors there to detect and deter crimes like attempted hijacking? And what about warrantless weapons frisks conducted by police officials as a routine part of their criminal enforcement policy?[47]

We have now seen at least eight historical and commonsensical exceptions to the so-called warrant requirement. There are many others[48] — but I am a lover of mercy. And by now I hope the point is clear: it makes no sense to say that all warrantless searches and seizures are per se unreasonable.

2. The Modified Per Se Approach. — At this point, a supporter of the so-called warrant requirement is probably tempted to concede some exceptions and modify the per se claim: warrantless searches and seizures are per se unreasonable, save for a limited number of well-defined historical and commonsensical exceptions.

This modification is clever, but the concessions give up the game. The per se argument is no longer the textual argument it claimed to

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States v. Martinez-Fuerte, 428 U.S. 543, 564–66 (1976) (border crossing search); United States v. Biswell, 406 U.S. 311, 316 (1972) (inspection of pervasively regulated business). In *T.L.O.*, the warrantless search was arguably both selective and intrusive; a fortiori, unintrusive and nondiscriminatory searches in public schools would seem permissible.

[45] As we have seen, the Warrant Clause does plainly presuppose a search for items akin to contraband or stolen goods. *See supra* pp. 765–66. But the possession of these items may be unknowing and wholly innocent; and the search warrant, strictly speaking, does not run against a criminal suspect, but against a place. *See* TAYLOR, *supra* note 18, at 60. As Professor Taylor notes, a search warrant is quasi-in-rem. *See id.* Most important, the first Clause of the Fourth Amendment explicitly addresses *all* searches and seizures, not just criminal ones. *See* U.S. CONST. amend. IV.

[46] It will not do to point to the greater trial protections accorded criminal defendants over civil litigants (proof beyond reasonable doubt, and so on). These procedural rights do not even begin to attach until one becomes "accused" in some way; and many searches and seizures, even of criminal suspects, occur well before this point.

[47] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

[48] Consider, for example, grand jury and legislative subpoenas, *see* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208–09 (1946); automobile searches, *see* Carroll v. United States, 267 U.S. 132, 147–53 (1925); and prison searches, *see* Hudson v. Palmer, 468 U.S. 517, 522–30 (1984).