INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary Peer Reviewed

www.ijlra.com

 ISSN: 2582-6433

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ISSN: 2582-6433

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 ISSN: 2582-6433

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CRIMINALISATION OF MARITAL RAPE IN INDIA: PROGRESSIVE STEP OR LEGISLATIVE OVERREACH?

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Abstract

Marital rape criminalization in India is a controversial issue of heated debate within the context of legal reform. According to existing law, namely Section 375 of the Indian Penal Code, husbands are protected from prosecution if they coerce sex with their wives, as there is an exception to marital rape that favors them. This essay discusses whether abolishing this exception, thus criminalizing all sex without consent in marriage, would be a step in the right direction or an interference by law where it is not needed.

While relying on other legal maxims, policy concerns, and the fundamental values of our Constitution, here I am relying exclusively on Indian sources, such as statutes, judicial rulings, committee reports, and scholarly writings. While some critics urge caution against state overreach into the private sphere of marriage, numerous legal experts in India contend that criminalising marital rape is necessary for advancing equality and upholding individual autonomy.

This article also provides suggestions on changes to legislation that recognize legitimate concerns, like the potential for abuse of the law, but ultimately protect women's rights. The article concludes that eliminating the marital rape exception would not only be fair but is also a necessary development of Indian law, and not an inappropriate encroachment on personal life.

Keywords: Marital rape; Indian Penal Code §375; Article 14; Article 21; domestic violence; legislative reform.

 ISSN: 2582-6433

Introduction

In India, the legal system historically presumed a wife's consent to sexual relations upon marriage. The colonial inheritance of the law incorporates into statute the outdated principle (customarily traced to Lord Hale) that "by marriage the wife hath given up herself in this kind unto her husband, which she cannot retract." Section 375 of the IPC (1860) thus defines rape broadly but with a rider: any sexual intercourse by a husband with his wife (over eighteen years) is not rape. In 2017, the Supreme Court's Independent Thought v. Union of India case increased the age protected from 15 to 18 for married girls but preserved the marital[1]. Marital rape therefore – compulsory sex between spouses – is still legal in India unless the wife is a child.

There has been increased debate on criminalization of marital rape. Empirical evidence indicates the issue is prevalent, and around 18% of married women say that they cannot say no to sex with their husbands[2]. Activists highlight the fact that numerous victims are not even able to access criminal relief, and critics highlight that the Protection of Women from Domestic Violence Act (2005) and cruelty sections of the IPC (for example, §498A) purport to offer remedies. Interestingly, the 2013 Parliamentary Committee (on the Criminal Law Amendment Bill) dismissed suggestions to criminalise marital rape, cautioning that it could "ruin the entire institution of marriage" and claiming that current laws (498A, DV Act) are adequate.

In May 2022, a split verdict in the Delhi High Court was delivered on the issue. Justice Rajiv Shakdher declared the marital rape exception unconstitutional, ruling that a wife's consent is always revocable and her bodily autonomy guaranteed by Article 21[3]. Justice C. Hari Shankar dissented, leaving to Parliament what he considered to be a complex "socio-legal" issue for legislative judgment. The Supreme Court has now consented to hear the merged appeals. The central government, in the meantime, has contended that eliminating the exception would be "excessively harsh, disproportionate" and could "destroy the institution of marriage".

Against this background, the query naturally arises: is removal of the marital rape exception a progressive step for women's rights or an excessive legislative encroachment? This paper

[1] Independent Thought v. Union of India, (2017) 10 S.C.C. 800, 826 (India).
[2] Int'l Inst. for Population Sci. (IIPS), *National Family Health Survey (NFHS-5), 2019–21: India Fact Sheet* (2021), https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf.
[3] X v. Union of India, W.P. (Crl.) No. 1082 of 2020, decided on 20 April 2022, 2022 SCC OnLine Del 2453 (Del HC).

 ISSN: 2582-6433

answers that question solely from an Indian angle. It examines statutory law provisions, constitutional protections (Articles 14, 15, 21), and judicial decisions, in addition to legislative history (Law Commission and committee reports, parliamentary debates). It further examines Indian learned writings and socio-cultural contentions. The aim is to weigh equality of the sexes and individual freedom against family and privacy concerns, and indicate lines of reform that respect women's rights without avoiding legitimate context.

Research Methodology

This research paper employs a doctrinal-analytical approach, which is traditionally employed in legal research and widely practiced. Doctrinal research, also known as "black-letter law" research, is a systematic presentation of legal rules, principles, doctrines, and statutes as they stand within the formal framework of the legal system. In the paper, the doctrinal method is supplemented with normative examination to determine the desirability and constitutional validity of the marital rape exception in Indian criminal law.

Scope and Sources

The study only includes Indian laws, legal principles, judicial cases and scholarships since the necessity is to maintain a focus that remains Indian-centred. Primary sources referred to are:

- Statutory provisions, primarily Section 375 and 376 of the Indian Penal Code, 1860; Section 498A of the IPC; the Protection of Women from Domestic Violence Act, 2005; and appropriate sections of the Indian Evidence Act, 1872.
- Judicial verdicts, some landmark Supreme Court and High Court judgments like Independent Thought v. Union of India (2017), Harvinder Kaur v. Harmander Singh (1983), and the 2022 Delhi High Court split verdict on marital rape.
- Government reports and recommendations of committees like the 172nd Law Commission Report (2000), the Justice Verma Committee Report (2013), and Parliamentary Standing Committee debates on the Criminal Law (Amendment) Bills.
- Secondary sources, like peer-reviewed Indian legal journal articles, Indian legal scholars' books, policy briefs, and law review publications dealing with constitutional law, criminal law, and gender justice.

Nature of Research

The study is qualitative, not quantitative, since it does not cover numerical data, statistical testing, or survey-based empirical fieldwork. Nevertheless, it does use contextual statistics—

e.g., data from the National Family Health Survey-5 (NFHS-5) and reports of the National Crime Records Bureau (NCRB)—only to depict the socio-legal aspects of the problem. These facts are used to support the legal arguments and emphasize the importance of reform, but they do not constitute the main body of analysis.

The research is also normative, in that it does not merely describe the law as it stands but evaluates whether the current legal position is just, effective, and constitutionally sound. Here, the marital rape exception in IPC Section 375 is subjected to critical examination based on constitutional morality and basic rights, particularly Articles 14 (equality before the law), 15 (discrimination prohibition), and 21 (protection of life and personal liberty) of the Indian Constitution.

A constitutional hermeneutic model informs the reading of statutory as well as constitutional provisions. The method reads texts against the developing jurisprudence, social conditions, and the transformative constitutionalism doctrine, which the Indian courts have applied in cases such as Navtej Singh Johar v. Union of India (2018) and Joseph Shine v. Union of India (2018) to deconstruct outdated norms and uphold personal freedom[4],[5].

The legislative interpretation being made here takes into account the spirit and letter of the law. For example, even though the language of IPC §375 contains a clear exception for rape within marriage, prevailing court trends and interpretive principles (e.g., purposive interpretation, mischief rule) are applied to question its validity in the current constitutional context.

Limitations and Ethical Considerations

No original empirical work was done (e.g., field interviews or questionnaires), and the paper bases all its arguments on secondary legal documents and officially released data. Although this limits the paper from providing new empirical observations, it enhances the validity and reliability of its findings by using authoritative, verifiable legal information.

Ethically, every attempt has been made to exclude any manner of bias or misrepresentation. The arguments put forward are backed by established legal doctrine and valid sources, and a

[4] Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76 of 2016 (and connected cases), Supreme Court of India, decided 6 September 2018, reported at (2018) 10 S.C.C. 1 (India).
[5] Joseph Shine v. Union of India, Writ Petition (Criminal) No. 194 of 2017, Supreme Court of India, decided 27 September 2018, reported at (2019) 3 SCC 39, AIR 2018 SC 4898.

balanced perspective is ensured by considering opposing arguments—such as fear of false accusations or abuse of criminal law—and critically assessing them.

The primary aim of this approach is to respond to the key research query: Whether criminalization of marital rape in India would constitute a progressive law reform or an unwarranted legislative intrusion into the privacy of marriage. Through examination of the problem in the context of Indian law, this study seeks to make some useful contributions towards the current national discourse and provide insights that are informed by constitutional analysis, gender justice, and doctrinal clarity.

Review of Literature (Indian sources only)

Most Indian legal scholarship now argues the marital rape exception is unconstitutional and must be repealed. An Economic & Political Weekly commentator flatly states the exception "must be removed," noting that Supreme Court decisions affirm marriage does not imply irrevocable consent. Similarly, Kallakuru and Soni (2018) contend that the exception violates Article 14 (by arbitrarily discriminating against married women) and Article 21 (by depriving a wife of bodily autonomy). They point out that existing remedies (like the DV Act) are insufficient, so only criminal law can effectively protect victims. Scholars emphasize that marriage is not a shield for sexual violence; one analysis observes that even a law mandating conjugal rights was struck down as violating dignity, with the court recognising that "forced sex can exist" in marriage. Critics of the exception also dispute the "private sphere" argument. Carving marriage out from the law leaves wives of rapists "shielded from the law" with no remedy, as theindiaforum.in puts it. Thus, the consensus is apparent: violation of fundamental rights on non-consensual spousal sex, and the exemption is an anachronistic relic.

Scholarly commentary also scrutinizes the cultural assumptions underlying the exception. Kallakuru & Soni highlight that appealing to tradition to exclude reform is contradictory, as the law has rendered several 'sacred' practices (such as dowry demands and restitution of conjugal rights) ineffective in spite of cultural acceptance. They and others point out that constitutional morality overrules tradition: compelling sex unequivocally violates human dignity regardless of marital status. In this view, appeals to custom cannot justify denying legal protection to abused wives.

Few of the academic analyses report objections raised by policymakers, often to denounce

them. Reviews comment that a few Parliamentarians cautioned criminalisation may "destroy the whole institution of marriage," citing that other legislation already criminalises cruelty[6]. Commentators refer to a 2015 ministerial statement that blamed support for the exception on "low education levels, poverty, traditions, societal attitudes" considering marriage a sacrosanct[7]. Government counsel have described reform as “excessively harsh” and likely to destabilise families. These perspectives are usually presented only to be weighed against rights-based arguments, rather than defended as sound principles.

Commentators further follow the legislative context. They point out that Law Commission reports and expert committees (the 172nd Law Commission in 2000 to the Verma Committee in 2013) repeatedly suggested removing the marital immunity. For instance, the Verma Committee specifically suggested removing the exception, adding that marriage is no defense, and mandating the same punishment for other rapenujslawreview.org. Others comment that even preliminary penal code drafts (like the Bharatiya Nyaya Sanhita) have persisted with an exception for adult wives, showing a lag between reform proposals and legislative drafting. Altogether, Indian policy and scholarly literature predominantly discuss criminalisation in terms of a constitutional and social necessity, relegating cultural reservations to a second level. The dominant view is that reform is both justified and necessary, with the real debate now centering on how best to implement it.

Method

The research paper takes a doctrinal-analytical and normative approach, common in legal research, to analyze statutory provisions, judicial decisions, and constitutional principles methodically. The approach entails a critical analysis of the current legal framework regarding marital rape in India based solely on Indian constitutional, statutory, and judicial sources, with consideration for the general social and legal contexts.

1. Statutory and Doctrinal Analysis

The approach starts with a close reading of the statutory provision of Section 375 of the Indian Penal Code, 1860 (IPC), especially the Exception 2, whereby, clearly, sexual intercourse by a man with his wife (subject to the condition that she is not below fifteen years of age) is excluded

[6] Shalu Nigam, *The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities* (Jan. 2015), https://ssrn.com/abstract=2555076.
[7] Rishi Iyengar, *India’s Minister for Women: Marital Rape Is a Foreign Concept*, (Mar. 11, 2016), https://time.com/4251307/india-marital-rape-women-maneka-gandhi/.

from being called rape. This provision is assessed along with:

- Section 376 IPC (providing for punishment for rape),
- Section 498A IPC (relating to cruelty towards women by husbands and their families),
- The Protection of Women from Domestic Violence Act, 2005, which, while being a civil law, offers a wider definition of violence and abuse in marriage.

These legislations are contextually and purposively construed to determine whether the exception of marital rape is harmonious with the general legislative aim of upholding women's bodily autonomy, dignity, and equality before the law.

2. Constitutional Analysis

The approach then uses a framework of constitutional law to see if the exception of marital rape is contrary to the fundamental rights enshrined in Part III of the Indian Constitution. The concentration is on:

- Article 14 (equality before the law and equal protection of the laws),
- Article 15(1) (anti-discrimination on the basis of sex),
- Article 21 (protection of life and personal liberty, interpreted to encompass dignity, bodily integrity, and sexual autonomy).

The marital rape exception is examined through judicial principles like the test of manifest arbitrariness, reasonable classification, substantive equality, and transformative constitutionalism, which have been developed in cases such as Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, and Joseph Shine v. Union of India, (2019) 3 SCC 39.

The approach comprises constitutional hermeneutics, i.e., considering the statutory exception in accordance with constitutional principles and changing societal values to decide on its legality and constitutional viability.

3. Legislative History and Law Reform Reports

In order to comprehend the reason and resistance involved in the inclusion or exclusion of marital rape in Indian criminal law, the research technique entails a comprehensive examination of:

- The 42nd Law Commission Report (1971), which maintained the exception due to the "sacrosanct" status of marriage.
- The 172nd Law Commission Report (2000), which made a specific recommendation to delete the exception of marital rape.

- The Justice Verma Committee Report (2013), which pushed vehemently for criminalisation of marital rape following the Nirbhaya case.
- Parliamentary debates and Standing Committee reports of the Criminal Law (Amendment) Acts of 1983, 2000, 2013, and 2018 to follow the legislative uncertainties and social attitudes shaping this area.

These documents are employed not just to track legal provision development but also to identify legislative intention, policy issues, and social attitudes to be found in law-making.

4. Judicial Interpretation and Case Law Analysis

Another prominent feature of the approach is an in-depth examination of pertinent judicial rulings, specifically those that engage with consent, sexual autonomy, and gender equality under marriage. These include:

- Independent Thought v. Union of India, (2017) 10 SCC 800 – in which the Supreme Court read down Exception 2 to safeguard minor wives below 18 years of age.
- Harvinder Kaur v. Harmander Singh, AIR 1984 Del 66 – wherein the Delhi High Court deliberated on the sanctity of marriage as well as the boundaries of judicial intervention.
- X v. Union of India, 2022 SCC OnLine Del 1011 – the recent Delhi High Court split verdict on the constitutional validity of the marital rape exception.
- Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1 – reading reproductive and sexual autonomy into Article 21.

The decisions are critically evaluated for their legal rationale, handling of marital consent, use of constitutional principles, and approaches to interpretation (e.g., purposive v. textual).

5. Socio-Legal Contextualisation

Although primary empirical research is not involved, socio-legal analysis is used to place the doctrinal debate within Indian society in the current day. This entails:

- NFHS-5 statistics (2019-21) point to the extent of spousal sexual violence in India.
- Reports and publications of Indian women's rights groups (e.g., Lawyers Collective, Centre for Social Research).
- NCRB crime data against women to reflect gaps in enforcement.
- Public interest litigation trends, NGO submissions, and Amicus Curiae briefs filed before courts on the topic.

This background material is employed illustratively, rather than as the sole analytic approach, but to show the shortfall between law and lived experience and to emphasize the necessity of

reform.

6. Avoidance of International/Comparative Law

Intentionally, comparative international law (e.g., trends in the UK, USA, or South Africa) has been left out of the study to ensure a distinct, Indian-perspective lens. Although those jurisdictions can be persuasive, their socio-legal architecture and constitutional backgrounds differ and thus have not been used as a basis for the research here.

7. Limitations

The weaknesses of this approach are:

- Relevance of secondary data and pre-existing legal material found in the public domain.
- Lack of field-based or quantitative research, including interviews or surveys, which could have offered fresh empirical insights into the effect of the marital rape exception.
- The dynamism of public discourse—since the issue is now in litigation (e.g., the ongoing appeal before the Supreme Court in X v. Union of India), some conclusions might have to be revised as jurisprudence progresses.

Despite these limitations, the approach is capable of a stringent, balanced, and constitutionally grounded examination of the research query regarding how Indian law deals with marital rape and whether the exception tracks constitutional imperatives and the changing conception of marriage and consent in India.

Recommendations

From the analysis, a number of reforms are recommended. Firstly, substantive law needs to be altered. The parliament should strike out Exception 2 of IPC §375 and clearly state that marriage is no defence to rape. Consistent with the report by the Verma Committee, the revised law should eliminate any presumption of consent by a spouse and impose the same punishments for marital rape as any other rapenujslawreview.org. The suggested Bharatiya Nyaya Sanhita (Clauses 63–64) should then be amended accordingly instead of maintaining marital immunity. These adjustments would bring Indian law in line with the understanding that sexual autonomy cannot be separated from one's essential rights.

Second, procedural protection must follow criminalisation. Thus, for instance, provisions similar to Section 114A of the Evidence Act (creating a presumption against the accused in the case of child sex) can be thought of as being used to establish proof of consent problems in the

 ISSN: 2582-6433

case of marital rape. Equally, legal protections against false allegations should remain operational, and frivolous complaints should be punished as in other offenses. Judicial standards or law may mandate specialized education of judges and police officers in dealing with domestic and sexual crimes tactfully. By strengthening the framework of evidence and machinery of accountability, legislators can minimize genuine concerns about abuse without undermining the protection of the victims.

Third, supplementary measures need to be enhanced. The Domestic Violence Act already defines "sexual abuse" broadly; authorities should ensure this is enforced vigorously in spouse cases, while also preparing for criminal prosecutions under IPC. Support services (women's shelters, counselling, legal aid) should be expanded so that victims who choose to report have access to assistance. Public awareness and education campaigns can help change the mindset that marriage implies consent. Civil law should adapt to the change, too: for example, marital rape might be a cause of divorce or maintenance, so remedies would be consistent across civil and criminal jurisdictions.

Fourth, any broader legal changes need to be harmonised. Harmonisation of personal laws with criminal law (e.g., treating sexual violence in marriage as cruelty under family law) would operationalise the criminalisation. Policymakers could also consider enacting perpetrator rehabilitation or community interventions in the statute, although these cannot be substitutes for criminal sanctions. Notably, experience overseas suggests that spousal-rape legislation is best enacted with implementation oversight (as with the Nirbhaya Fund and one-stop centers) to bridge gaps in implementation.

Collectively, these steps would make criminalizing marital rape a thoughtful reform, not a raw overreach. The aim is to enforce women's rights, but remember the complicated backdrop of marriage. Through meticulous framing of amendments and bolstering surrounding safeguards, lawmakers can provide justice to victims without disproportionately hurting the institution of marriage.

Conclusion

The continued persistence of the marital rape exception in Indian law is not merely a legislative failure; it is a deep jurisprudential and moral stalemate. Not to protect a particular group based on marital status is to permit coercion in the name of domesticity. Not only does it undermine

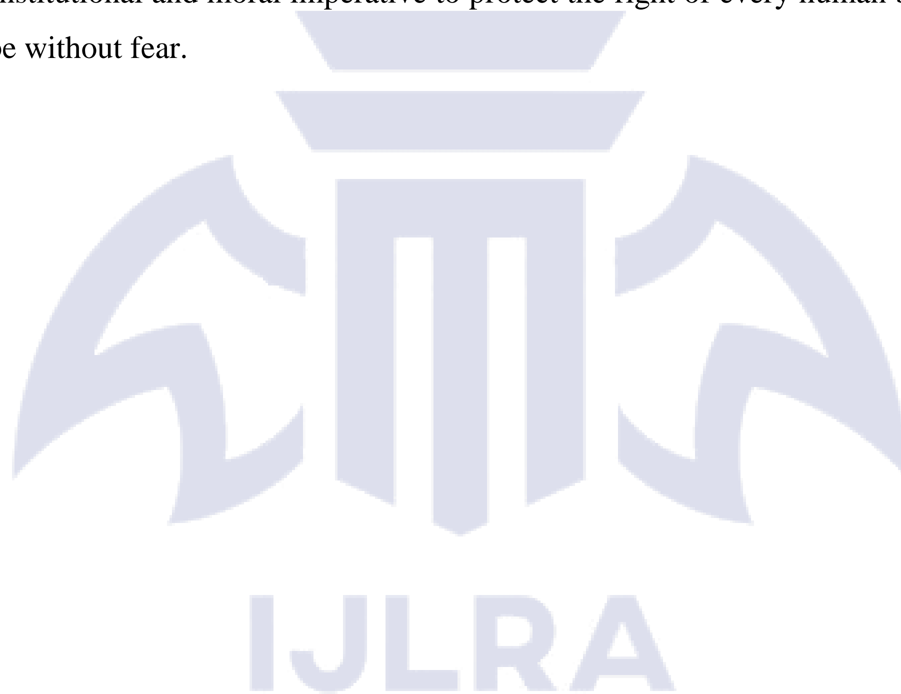
the assurance of individual security, which marriage is intended to provide, but it also undermines wider social trust in legal institutions to protect the dignity and autonomy of all citizens. Strikingly, data from the National Family Health Survey (2019–21) reveals that among married women aged 18–49 who reported sexual violence, 83 per cent attributed it to their current husband — a figure that starkly underscores the reality that intimate partners are often the perpetrators of such harm[8]. Furthermore, NFHS-5 data shows that 3.9 per cent of ever-married women reported experiencing sexual violence "often or sometimes" by their spouse[9]. This argument discloses a necessary truth: the domestic universe of marriage cannot be treated as a zone of legal exception. The fact of a marital relationship must not be permitted to provisionally suspend such basic principles of human freedom, bodily integrity, and the right of refusal. This exception is not one of legislative gaps but of deliberate legislative omission—one that has persisted through cultural deference, institutional reluctance, and an unwarranted fear of disturbing tradition. Tradition, however, need not be a cover for injustice. The perpetuation of this immunity sends a chilling message that some violence is acceptable, so long as it is located within the universe of family life. Legal reform is usually glacial, not because values are uncertain, but because it is perceived that challenging entrenched norms is politically costly. However, the building of a constitutional democracy requires such a calculation. In this regard, inaction in the presence of marital rape is more than a neutral act; it is complicity. Fear of false charges or interference with domestic tranquility, although not misplaced, must be balanced against the serious and long-term harm inflicted upon many individuals who have no access to their own domestic environment. Such fears can be alleviated by the use of procedural protections, requirements of evidence, and due process observances — but not by categorical immunity. The reasoning that criminalizing such acts would desecrate the sanctity of marriage is a misapplication of the underlying doctrine of respect. Conversely, a marriage built on fear, coercion, or assumption is extremely weak.

In comparison, the explicit articulation of consent within the institution of marriage strengthens its integrity, redefining it as an institution of equality, mutual respect, and shared dignity. The principle does not weaken the family unit; it supports its moral underpinnings. In fact, Indian social and legal awareness has consistently proved that it can transform by giving up ancient

[8] International Institute for Population Sciences (IIPS) and ICF, *National Family Health Survey (NFHS-5), 2019–21: India* (Mumbai: IIPS, 2021), p. 543.
[9] International Institute for Population Sciences (IIPS) and ICF, *National Family Health Survey (NFHS-5), 2019–21: India* (Mumbai: IIPS, 2021), p. 542.

 ISSN: 2582-6433

hierarchies and exclusions in the name of inclusive justice. This trajectory of advancement must be taken further in the contemporary era to cover the most personal blind spots in the legal order. Otherwise, it will not only continue the ongoing damage but will also destroy the essential guarantees inherent in the legal system. In short, the repeal of the marital rape exception should not be considered an extreme response but a long-overdue reform. It is not a matter of imposing alien values, but of bringing domestic law into conformity with the elementary values which a democratic society professes to hold dear. This reform will not destroy the institution of marriage; it will strengthen it by affirming that its base is not submissiveness or silence, but mutual respect for each partner's individuality. The waiting period has long since passed. What is needed now is action, not so much as a matter of law, but as a constitutional and moral imperative to protect the right of every human being to live, love, and be without fear.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