Episode 129: Panic Defense
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Phoebe Judge: This episode contains descriptions of violence and may not be suitable for everyone. Please use discretion.

[clip from *The Jenny Jones Show* begins]

Jenny Jones: Now, which of these ways would you choose to reveal your secret crush on someone? A) Would you write that first in the letter? B) Would you tell the person in private in case he rejects you? Or C) Would you tell that person that you're gay and you hope he is on national television? [audience erupts into cheers and laughter]

Phoebe: On March 6th, 1995, the daytime talk show host Jenny Jones filmed this episode about secret crushes. People were invited to come on the show to learn on television who had a crush on them. One of the guests was thirty-two-year-old Scott Amedure. His friend Donna Riley appeared on the show with him.

Jenny Jones: I want you know to meet Donna and Scott. Now, Donna has been helping Scott pursue his secret crush on John. John's backstage. He can't hear us.

[to Scott]

How bad's the crush? Tell me about the first time you met him. Where was he?

Scott Amedure: Basically... well, he was under a car working on her brake line. [Jenny affirms] [audience laughs]

Jenny Jones: And that was your first time. What was your first impression?

Scott: Um... [chuckles] well, I only saw the lower half of him so you can imagine... [audience reacts enthusiastically]

Phoebe: The three of them: Scott, Donna, and John, were all friends. Jenny Jones then asks Scott more about why he liked John - what exactly he liked about him. She asked if he had fantasies about John. He did. One included champagne and whipped cream. [audience reacts enthusiastically in support]

Jenny Jones: Now, he knows you're gay, right?

Scott: Yeah. [crosstalk]

Donna Riley: [crosstalk] Yes.

Jenny Jones: Do you know that he is?

Donna: No.

Scott: Anything's possible.

Jenny Jones: Let's see if he really is. [chatter among audience] … Get the headphones off of John and let's have John come out here and see who has the crush on him. Here's John. [audience claps and cheers]

Phoebe: John Schmitz comes out on stage and kisses Donna on the cheek. And gives Scott an awkward looking hug.

[to John]

Jenny Jones: Did you think Donna has a crush on you?

John Schmitz: Did I? No, we're good friends.

Jenny Jones: Well, guess what. It's Scott that has the crush on you. [audience laughs and cheers]

John: You lied to me! [jokingly]

Phoebe: He covers his face with his hands. Jenny Jones then shows him a playback of the fantasies Scott described earlier on the show.

Jenny Jones: Did you have any idea that he liked you this much?

John: Um...no. No. No, I did not. [audience laughs]

Jenny Jones: Can you tell us what your status is? Are you involved with anybody? Or...

John: Um, no. But I am definitely a heterosexual, I guess you could say. [laughs] [audience cheers] [clip ends]

[music comes in]

Phoebe: After the show, Scott, Donna, and John flew home to Michigan together. They went out drinking that night. Three days after appearing on the show, John found an anonymous suggestive note on his door. It read, "If you really want to get it off, I'm the one who has the right tool." John went to the bank, he took out money, and bought a shotgun. Then, he went to Scott's house. When Scott answered the door, John asked if he had left the note. According to court documents, Scott smiled. Then, John went back to his car, got the shotgun, and shot Scott two times in the chest at close range. John left the scene and called 9-1-1. He told the operator he had just shot someone. When the operator asked why, he said, "Because he picked me on national TV and he's a homosexual."

John was charged with first degree murder. His attorney argued that he was suffering from diminished capacity when he killed Scott because he was dealing with depression and a thyroid condition. And his feeling that he had been humiliated on *The Jenny Jones Show* when Scott confessed his crush, pushed him over the edge. Here's one of his lawyers, Fred Gibson.

Fred Gibson: I think we have to ask ourselves if we were in that same situation, how would we react? And one never knows how they would react unless you, in fact, are confronted with a particular situation.

Phoebe: Another one of Scott's lawyers said in a later interview that John was in a panic that he was being falsely accused or identified as a gay person. He argued in court John should be convicted of a lesser charge than first degree murder because his actions were impulsive, not premeditated. Others argued that there was no way John's actions could be seen as impulsive. [music fades out]

Cynthia Lee: There was tons of evidence that Jonathan thought about killing Scott in advance.

Phoebe: George Washington University law professor, Cynthia Lee.

Cynthia: For one thing, after he received the note, he went to his bank to withdraw enough money to buy a shotgun. He then drove to a store to purchase the shotgun, and he purchased the ammunition that he ended up using to kill Scott. Another thing is that he left the shotgun in his car when he went to Scott's place. And then, only after Scott admitted that he left the note at Jonathan's house, did Jonathan go back to his car, get the shotgun, and then come back to shoot Scott twice in the chest.

[to Cynthia]

Phoebe: Well, I'd say... I mean, that seems about as premeditated as it gets.

Cynthia: Absolutely. And despite this huge evidence of premeditation and deliberation, which is necessary for a first-degree murder conviction, the jury found persuasive Jonathan's claim of diminished capacity and found him guilty of second-degree murder.

[as narrator]

Phoebe: John Schmitz was sentenced to twenty-five to fifty years in prison. He was released on parole in 2017 after twenty years.

Scott Amedure's family sued *The Jenny Jones Show* arguing that the show was partly responsible for his death. They were awarded $25 million, but the decision was later reversed. The episode never aired, but the case drew national attention. And there was debate about whether *The Jenny Jones Show* was at fault. Talk shows that specialized in these surprise reveals came under attack. LGBTQ activists said there wouldn't be as much blame on the show if the victim hadn't been a gay man. Jeffrey Montgomery, the president of a gay and lesbian advocacy group said, "If the person who came out with the secret was a Jewish woman, or a Black woman, or an Asian woman, and he went over to her house the next day and killed her because he was so repulsed that she had embarrassed him that way on national television, nobody will be writing stories on the TV show's responsibility. Everyone would be writing stories about this racist, this anti-Semite."

A *New York Times* opinion piece read, "Immediately hands were being wrung about the state of television talk shows. But the circumstances of the killing seemed almost to be taken for granted as if there was nothing, all that mysterious or confounding about so violent a response to an expression of unrequited affection– man to man." [music comes in]

John Schmitz wasn't the first defendant whose attorney used what's called "the gay panic defense." And he wasn't the last. Gay and trans panic defense strategies are still

being attempted by lawyers in courts across the country. I'm Phoebe Judge. This is Criminal.

Cynthia: In gay panic cases, typically the defendant is a man who has killed a gay man. The evidence that he was responsible for the killing is very strong and the defendant claims that he got so upset that he lost his self-control after the victim made a sexual advance upon him. And therefore, the jury should find him not guilty of murder, but instead guilty of voluntary manslaughter. In a trans panic case, typically the defendant is a man who has killed a transgender woman. The evidence against him is very strong and the defendant claims that he became so upset after finding out that the victim's biological sex was male, that he totally lost his self-control and therefore should be found not guilty of murder, guilty instead of voluntary manslaughter.

Phoebe: The idea of gay panic has roots in a hundred-year-old theory about latent homosexuality as a mental disorder. In 1920, a psychiatrist named Dr. Edward Kempf observed that some of his patients who identified as heterosexual became anxious when they were around others of the same sex. [music fades out]

Cynthia: And this, he theorized was caused by tension between their feelings of attraction to members of the same sex and their belief that they should be attracted to members of the opposite sex. So, Dr. Kempf concluded that these patients of his were latent homosexuals: gay and lesbians suffering from what he called "homosexual panic disorder." So, criminal defense attorneys representing male defendants - male murder defendants - who had killed gay men, began utilizing this concept of homosexual panic in the late 1960s and early 1970s. But in contrast to Dr. Kempf, they would argue that their clients lost their mental faculties when the victim - a gay man - made a sexual advance upon them.

Carsten Andresen: The first case they usually cite is 1967.

Phoebe: Carsten Andresen is an assistant professor of criminal justice at St. Edward's University in Texas.

Carsten: And it was this case in California, Rodriguez versus California, I believe. And that was the case where a young man was out with his friends - he was a teenager, and they were kind of raising hell - and he went into an alley to pee… to urinate. And an old man got mad and walked up and grabbed his arm, like, ‘Why are you peeing in my alley?’ And this individual, he beat that man to death. And then he argued that, Well, I thought the man was making a pass at me. I lost my mind. And then I used the gay panic defense.’ And it was unsuccessful when he used it, but people have been trying to use the gay panic defense ever since. [music comes in]

Phoebe: Even though it's referred to as the gay panic defense, it's more of a tactic used to bolster other traditional criminal law defenses. There are four main ways lawyers use it. The first is part of an insanity defense.

Carsten: Somebody basically says, 'I murdered this person because they made a pass or an overture at me. And that pass or overture was so threatening to me that I lost my mind. I lost my sanity temporarily and I killed that person.' The second one is diminished capacity. And that's a case where somebody is maybe depressed ordinarily and what they would say is that 'When this person made a pass at me, it took my fragile state of mind and temporarily pushed it over the edge. And I killed that person.'

Phoebe: Gay panic has also been used as part of a self-defense argument. The defendant may say that the victim was trying to sexually assault them. And so, they had no choice but to kill them to protect themselves.

Carsten: And some of the attorneys are quite candid in how they describe it. Some of the attorneys sound like they've almost won the lottery because they can't believe that it actually worked. So, they sort of tried something and they're like, o*h my gosh, this worked.* So, there's this terrible case in Denton that happened in 1995. And that attorney– it was an individual who stabbed somebody to death, I think thirty-nine times and said that they were defending themselves from a sexual assault. And that attorney when he was interviewed later, he said, "I couldn't believe that this worked. This guy had a criminal history. I thought for sure he's going to go away." But basically, what they'll say is, they will say, 'This individual is a very sexually aggressive person. He was sort of trying to be, you know, trying to sexually assault my client...' There's a few cases where if the person is alleged to have HIV or has HIV, they'll bring that in and say, 'You have the right to defend yourself against somebody who has a deadly weapon.' So, they are pretty explicit and over the top.

Phoebe: The fourth way a gay or trans panic defense is used is as part of what's called a "provocation defense."

Carsten: For provocation, probably the most famous case is this case in New York where a man was hitting on a woman and the woman said to the man in front of his friends, “I don't think you'd even be interested in me because I'm trans.”

Phoebe: This was in 2013. The woman's name was Islan Nettles.

Carsten: And then the man's friends laughed at him, like, 'You're hitting on somebody. And she's trans.' And so, the man was so offended, his masculinity was so threatened that he that he attacked the person– attacked the woman and beat her to death. He only got twelve years in prison for that. And he had a very famous quote where he said

something to the effect of, 'I don't care what they do. She threatened my pride. And so, I had to do something about it.' [music comes in]

Phoebe: The American Medical Association has called violence against the transgender community “an epidemic.” As Cynthia Lee writes, "When a man is charged with murdering a transgender woman, a common defense strategy is the trans panic defense." She says that most often gay and trans panic defense strategies are seen as part of a provocation defense.

Cynthia: And what a defendant claiming provocation will do is say that he or she was provoked into a heat of passion by legally adequate provocation. Now, originally at early common law, legally adequate provocation was limited to certain categories. These were things like mutual combat, the defendant suffering from an extreme assault or battery, the defendant catching his wife in the act of adultery. But over time, the courts abandoned the early common law categorical approach to provocation and moved to what's called “the modern approach to provocation” under which a defendant claiming provocation can receive a mitigation from murder to manslaughter if the jury finds that he was actually provoked into a heat of passion, if the reasonable person in the defendant's shoes would have been provoked into a feat of passion, if the defendant didn't have sufficient time to cool off, and if the reasonable person in his shoes would not have cooled. And at least in some circles, this type of argument might have currency if the jury thinks that an ordinary or typical man would also become upset if they became the subject of a sexual advance from a gay man. [music fades out]

[to Cynthia]

Phoebe: I mean, this really seems to be potentially stirring up the homophobia of the jury.

Carsten: *Oh*, yes.

[as narrator]

Phoebe: Carsten Andresen says juries in different parts of the country have different attitudes. He's been studying cases in Texas where he lives and where he says attitudes towards gay and trans people aren't always, quote, "friendly."

Carsten: And in Texas, it's evolved to such a sense that if somebody were to say, ‘I'm gay’, I think that would be seen as a combative action. Everything that that victim is, is sort of put on trial. So, I think just saying that somebody's gay, that's the first step in sort of bringing a whole host of images. Everything in your life will be turned over and cast in a sinister light by a defense attorney in the gay panic case. So, I think when you have

that environment in the state, and then you have a defense attorney that knows how to use these defenses, you are looking at a really lethal mixture. [music comes in]

Phoebe: In 2008, a fifteen-year-old named Larry King was shot and killed by a classmate, fourteen-year-old Brandon McInerney in Oxnard, California. Larry King had recently started wearing high heels and makeup to school. And Brandon McInerney claimed that Larry had asked him to be his Valentine. A couple of days later, Brandon brought a gun to school and shot Larry from behind in the computer lab. He had told at least three classmates he was planning to kill Larry. Brandon McInerney was tried as an adult for first degree murder. Defense attorneys introduced a photograph of the victim, Larry King, holding a green prom dress. They put a psychologist on the stand who later said in an interview, "Of course, if a boy comes onto another boy, that would be like the ultimate humiliation." The assistant principal at Brandon and Larry's middle school, Joy Epstein, testified in the trial. She later said, "The entire trial was about Larry. It wasn't about Brandon or what Brandon did. Everything was always about Larry: how he dressed, how he acted. The trial focused so much on Larry's sexual orientation." The prosecutors criticized the defense strategy calling it gay panic. The judge specifically told jurors not to allow prejudice based on sexual orientation or gender identity to affect their decision. But the jury deadlocked. And some jurors later said they thought Larry had sexually harassed Brandon and was in part responsible for his own death.

[clip from *The Ellen DeGeneres Show* begins]

Ellen DeGeneres: And we have a great, great show for you, and we're going to have a whole lot of fun, but for a minute, I need to talk to you about something that's really serious and really sad.

Phoebe: Ellen DeGeneres in 2008.

Ellen DeGeneres: And if you know me, it's hard to talk about sad stuff without getting emotional, but this is really important to talk about. On February 12th, an openly gay, fifteen-year-old boy named Larry who is an eighth grader in Oxnard, California was murdered by a fellow eighth grader named Brandon. Larry was killed because he was gay. Days before he was murdered, Larry asks his killer to be his valentine. [audience reacts with a tone of shock and disappointment] This is personal to me. A boy has been killed and a number of lives have been ruined. And somewhere along the line, the killer, Brandon, got the message that it's so threatening and so awful and so horrific that Larry would want to be his valentine, that killing Larry seemed to be the right thing to do. [music fades out]

Phoebe: We'll be right back.

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[music comes in]

Carsten: There are some really startling cases that I can't believe have never attracted public attention. And I'll find them and I'll– how was this... how did nobody notice this? How come nobody's talking about that?

Paul Howard: He just never met anyone who he did not immediately convert into a friend.

Phoebe: Paul Howard's been the District Attorney in Fulton County, Georgia since 1997. Fulton County has the highest population in Georgia. It includes Atlanta. He's speaking about his colleague and friend, Assistant District Attorney, Ahmed Dabarran.

[to Paul]

How did you interact at the office? Tell me about what it was like interacting with him.

Paul: Well, it was really strange because he would come by, and he would ask to see me, and then when he would come in, he would just say, "Hey, Mr. Howard, how're you doing?" But he asked as if he really wanted to know how you're doing. And I just thought it was so unusual. He always seems so happy just to be alive and so happy to do what he was doing. So, he was always the person that you could count on to be at work. So, when he didn't show up for work, we said, 'Hey, this is really unusual that he has not shown up for work.' And that's when we finally made an effort to try and locate him. We started calling him. We started to call the numbers that we had from him. We didn't get an answer. And during those days, we utilized digital pagers. And so, we actually paged him or beeped him to see whether or not we could get him to return the call.

[as narrator]

Phoebe: They did get a response to their page, but there was something odd about it.

Paul: If it had been Ahmed, we would have expected whatever message we received to have been quite different.

[to Paul]

Phoebe: What was the message on the pager?

Paul: I don't remember exactly what it was. It might've been something like... 'Who is this?' Or something of that sort, as I recall. But it was just not Ahmed. And it was very

strange that if you are returning a pager to our office that you would ask 'who is this?' And that's what immediately tipped us off that something was up.

Phoebe: It didn't sound like him.

Paul: Yeah, not at all.

[as narrator]

Phoebe: Paul Howard called the Chief Investigator for the county and asked him to go to Cobb County where Ahmed lived.

Paul: Then my Chief Investigator called me back and said, "I got some bad news." And I said, "What's going on?" And he said," I think that Ahmed is dead."

[to Paul]

Phoebe: What did you think had happened?

Paul: Well, of course, I mean, I'm thinking it's gotta be some accident or *you guys made a mistake*. But couldn't be Ahmed. I mean, I just– my thought was, *it's gotta be some kind of accident. What's going on?* And then, my investigator began to give me some of the details and we then, of course, called the police department in Cobb County and they started to look into what had happened. And that's when we started to piece together apparently what had happened that led to his death. He had picked up a male - someone who was a stranger to him - that he had apparently met this a young man someplace in Atlanta. And the young man had accompanied him back to his apartment. And apparently the reason that he brought him back was for the purpose of having sex with him.

[as narrator]

Phoebe: According to court records, Ahmed was hit on the head with a lamp or other blunt object between thirteen and fifteen times while he was sleeping. When they arrived at the scene. Police noted that Ahmed's cell phone was missing, along with his car. Police followed information from Ahmed's stolen cell phone. They were able to track down his stolen car. Eventually they located a suspect, a man named Roderiqus Reshad Reed.

Paul: And we were informed by the police department that once he was brought in, he gave a statement. And what he told the police is, is that Ahmed had in fact picked him up. And, uh... but he said that Ahmed had attempted to sexually assault *him*. And he says that he was defending himself from this sexual assault. And that's what led him to kill Ahmed.

[to Paul]

Phoebe: Was there any indication that that Ahmed was attacking the defendant?

Paul: No. There was no indication. In fact, I believe the evidence shows that Ahmed was in a sleeping position on his sofa or that he might have in fact been asleep. But there was no evidence to show that he was attacking the defendant.

[as narrator]

Phoebe: Police interviewed acquaintances of Rodrigues Reshad Reed during their investigation. One said that he had bragged about killing a man in Cobb County. Two others said he had told them that he had killed a man by striking him on the head and that he'd stolen his car. Roderiqus Reshad Reed later confessed that he attacked Ahmed while he was asleep. He was charged with felony murder, malice murder, and armed robbery.

[to Paul]

Did you attend the trial?

Paul: I attended the trial for several days. Yes, I did.

Phoebe: How did you expect the trial to go given the evidence that was out there?

Paul: My expectation was that he would be convicted. The defendant would be convicted based upon the evidence that showed that Ahmed would not have been in a position to attack him. This whole story about him defending himself seemed to me not to be legitimate when after that takes place, many of Ahmed's personal items were removed. So, why would you steal items from someone who is trying to attack you? I thought it was a... not a very good defense and so, we thought - and I thought that the defendant would be convicted. [music comes in]

I was totally shocked when I started to see the way that the case was unfolding. I was surprised that the judge would even allow this - what I term is term as a gay panic defense, the notion that if Ahmed was homosexual - that he somehow prompted or was responsible for this death. And I was surprised that the prosecutors did not make a more substantial effort to keep that whole defense from even being discussed. And I just thought that that was just strange. And it was just not the– what I thought was the appropriate way that it should have been handled. It was frustrating, not only because of the defense, but the way that it was termed as if being gay somehow made you a proper subject for death or murder, which I just thought was just totally ridiculous.

[as narrator]

Phoebe: Roderiqus Reshad Reed was acquitted of all charges. He was free to go home. Paul Howard says he won't forget the image of him walking out of the courtroom, waving and smiling. Ahmed's colleagues established an annual award in Ahmed's honor. In 2005, Paul Howard held what might've been the first conference for prosecutors to practice and plan for what to do if opposing counsel attempts gay panic strategies. Since Ahmed's case nearly two decades ago, Paul Howard says the defense has been raised once or twice in his jurisdiction, but not in a substantial way in many years.

Cynthia: I think it's a reprehensible defense. I think that a man who kills another man based on a non-viol– should not, first of all, I think that it's not reasonable to kill in response to a *non-violent* sexual advance. And I think that to say that it is reasonable to be provoked, if I were sitting on a jury, I would not find that persuasive. [music fades out]

Phoebe: In 1998, in Laramie, Wyoming, a cyclist saw what he thought was a scarecrow. It turned out to be University of Wyoming freshmen Matthew Shepard, unconscious and tied to a fence. After having been tortured and set on fire by two men he'd met in a bar, he died six days later. One of the defendant's attorneys attempted use gay panic as part of their defense. But the judge said no.

Cynthia: But despite this ruling, the defense was allowed to call two witnesses to the stand. One was a man who was at the Fireside Lounge the night that Matt Shepard was killed. And he testified that Matt Shepard sat down next to him and that he felt really uncomfortable, especially when Matt Shepherd licked his lips suggestively. Now, why would the defense put forth this witness except to convey to the jury, *look, here's a heterosexual man, and he was uncomfortable when Matt Shepard - a gay man - sat down next to him and licked his lips suggestively.* The second witness they called was a man who had been at a lake party with Matthew Shepard several months before Matt Shepard was killed. And this witness testified that Matt kept asking him to go for a walk around the lake and he kept telling Matt, 'No. I don't want to go for a walk.' And Matt kept persisting. And finally, after Matt kept– was tugging on his shirtsleeve and asking to go for a walk around the lake, he got so upset that he punched Matt. Now again, why was this witness brought forth by the defense? To show or signal to the jury that the reasonable or i.e., "ordinary heterosexual man" would be provoked into a heat of passion if sexually advanced upon.

Phoebe: Even when a judge explicitly rejects the defense team's effort to employ gay panic strategies, defendants and other witnesses are still able to take the stand and talk about how they felt. Gay panic can still end up being part of a trial in subtle and less subtle ways. And this is what's complicated about legislative attempts to ban the strategies altogether.

Cynthia: One argument against banning the gay panic defense is that even with a ban in place, the defendant has the right to testify and can take the stand and still get the idea that he was in fact provoked by the victim's sexual advance across to the jury. And if the jury is inclined to sympathize with the defendant, they are likely to find in his favor, even if a ban is in place; or they can find it in his favor, even if a ban is in place.

Phoebe: In 2013, the American Bar Association officially asked each state legislature to ban gay and trans panic defenses. Not many have. Critics have said that lawmakers should address the underlying social issues that lead judges or juries to accept these defenses rather than simply ban the defenses themselves. But when New York passed its ban this summer, Senator Brad Hoylman said, "I don't think we can leave it to judges and juries given the record of homophobia that we've seen in courtroom." [music comes in]

Cynthia Lee has been teaching law since 1993 and talking to law students about gay and trans panic defenses. She says that in that time, she's noticed a change.

Cynthia: I think before, when students would hear about the gay panic defense, they would actually sympathize with the defendant. But in more recent years, I see an opposite reaction. I think most of my students are appalled that this kind of defense is used and that it would be successful. They don't find it persuasive that a reasonable man would be provoked into a heat of passion.

Phoebe: Earlier this year, New York, Connecticut, Hawaii, Maine, and Nevada enacted bans of gay and trans panic defenses, joining California, Illinois, and Rhode Island.

Criminal is created by Lauren Spohrer and me. Nadia Wilson is our senior producer. Susannah Roberson is our assistant producer. Audio mix by Rob Byers. Thanks to Thomas Curry who helped co-produce this episode with us. Julienne Alexander makes original illustrations for each episode of Criminal. You can see them at thisiscriminal.com.

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