

In Silicon Valley, Criminal Prosecutors See No Evil

The Elizabeth Holmes fraud trial is set to be a major spectacle, but tech executives generally get a pass when it comes to wrongdoing.



By David Streitfeld

Published Sept. 7, 2021 Updated Sept. 17, 2021

SAN FRANCISCO — The coronavirus pandemic has helped Silicon Valley companies in many ways, from bringing them hordes of new customers to weakening the competition to juicing the bottom line.

Here's a less obvious benefit: the threat of criminal prosecution has nearly disappeared.

That fact is obscured by the case against Elizabeth Holmes, the founder of the defunct blood-testing company Theranos and the most prominent executive to face criminal fraud charges in the history of Silicon Valley. Her trial, with opening statements set to begin on Wednesday, raises issues of deception, gender, transparency, out-of-control hype and the sartorial influence of the Apple co-founder Steve Jobs, whose style Ms. Holmes mimicked.

But behind the spectacle is the reality that criminal prosecutions in Silicon Valley are a rarity. Even a guilty verdict against Ms. Holmes is unlikely to change that.

Federal prosecutors in Northern California took on only 57 white-collar crime cases in the 2020 fiscal year, down from 94 in 2019, according to researchers. Although 2021 is likely to show a rebound, the total will still be far below the heyday of prosecutorial action in 1995, when 350 cases were brought.

As Silicon Valley has mushroomed from an obscure specialty industry to the wealthiest and most influential collection of companies in history, prosecutors have occasionally promised more attention to it. And there have been brief spikes in cases. They never last.

Nationally, there has been a long-term trend away from white-collar prosecutions. The shift was accelerated by the Sept. 11 attacks, which reallocated investigative resources to the fight against terrorism. But the drop in Northern California was nearly twice as steep

from 1995 to 2019 as it was in the Southern District of New York, which has jurisdiction over Wall Street, according to data from the Transactional Records Access Clearinghouse at Syracuse University.

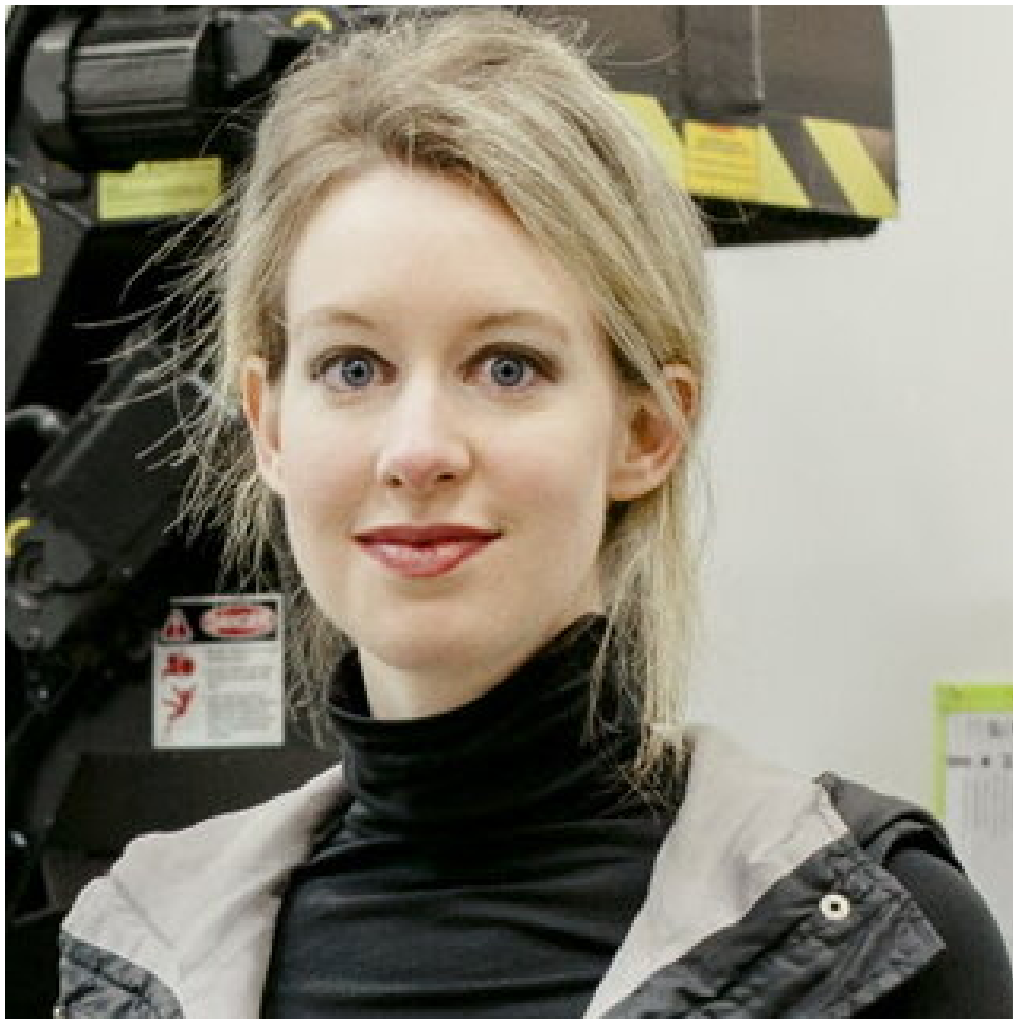
A spokesman for Stephanie Hinds, the acting U.S. attorney for the Northern District of California, the office that is prosecuting Ms. Holmes's case, declined to comment.

Who's Who in the Elizabeth Holmes Trial



Erin Woo

📍 Reporting from San Jose, Calif.



Here are some of the key figures in the case

→

One possible explanation for the decline is that there is simply less crime in Silicon Valley these days. Even before the pandemic, tech was booming. Money flooded into new ventures, some of which quickly achieved \$1 billion valuations. People were getting seriously rich. Why bother to do it illegally?

“Silicon Valley is a lot cleaner today than when I started, during the 1990s dot-com bubble,” said Reed Kathrein, a San Francisco lawyer who successfully sued Ms. Holmes and Theranos in 2016 on behalf of investors. “Everyone is throwing money at these start-ups. Everyone thinks they’re going to win the lottery. It’s easier to be honest.”

Reforms prompted by the collapse of WorldCom, a long-distance telephone company, and Enron, an energy company, in the early 2000s have also had an impact.

“Some of the changes in laws, like the Sarbanes-Oxley Act, put the screws on the accountants,” Mr. Kathrein said. “They have to do their jobs now.”

Thirty years ago, the tech industry was known as much for physical products as for software. Indeed, software used to be a physical product. If sales were not going well, that offered possibilities for subterfuge.

MiniScribe, a Colorado disk storage company that had fallen on hard times, was taken over in 1984 by Hambrecht & Quist, prominent Silicon Valley financiers. The investment firm pumped in money and installed its own management. In 1988, to keep its numbers up, MiniScribe managers packed 26,000 bricks into MiniScribe boxes and shipped them to Singapore. When the scheme was revealed, the company went bankrupt and the chief executive went to jail.

In this sense, Mr. Kathrein noted, Ms. Holmes’s case was a throwback. She was charged with making false and misleading statements to investors that Theranos’s proprietary analyzer, named Edison, was a medical marvel that could perform a full range of clinical tests. It could not.

“She was shipping bricks,” he said. A lawyer for Ms. Holmes declined to comment.

Mr. Kathrein’s conclusions are not widely accepted. Asked if tech people had become more honest over the decades, Margaret O’Mara, a historian of Silicon Valley, burst into laughter.

“The hubris and bluster and sometimes unethical (and occasionally criminal) behavior hasn’t gone away, but has increased in volume as the scale, speed, wealth and hype of the tech world — and those companies that identify as tech companies — has gotten greater,” she said. “A decline in prosecutions should not be interpreted as less crime, but harder-to-prosecute cases.”

Another significant factor: the special status of tech.

“The Valley wasn’t Big Oil or Wall Street,” Ms. O’Mara said. “It wasn’t a target. It was innovators and entrepreneurs. Politicians were friendly.”

So was everyone else, including reporters. Even now, the media has largely focused on the impact that the companies have on society rather than any crimes that have been committed. When eBay employees were accused last year by Massachusetts prosecutors of having terrorized the proprietors of a mildly critical website, the story barely lasted through one news cycle.

If Ms. Holmes had been an older man instead of an attractive young woman, her case would most likely not be front-page fodder. Proof of that can be seen in the case against Prithviraj Bhikha, who is known as Roger, a former senior director with Cisco Systems, a maker of networking products.

Mr. Bhikha, now 52, was convicted of setting up a dummy vendor, called Lucena, that sold \$10 million of services to Cisco from 2014 to 2017. At one point, Mr. Bhikha brought in an impostor to Cisco to pose as Lucena's chief executive during a meeting. He was sentenced to three years in prison on Aug. 25, a development that yielded minimal news coverage. Cisco said in a statement that it was grateful to law enforcement.

The closest parallel to Ms. Holmes's case in recent years was that of Anthony Levandowski, a self-driving car engineer who worked at Google and later at Uber. He pleaded guilty in 2020 to trade secret theft of Google's autonomous driving technology. Like Ms. Holmes, Mr. Levandowski was originally celebrated as a genius for whom ordinary rules did not apply. Sentenced to 18 months in prison, the engineer was pardoned by President Donald J. Trump in January.

“Silicon Valley is not the Wild West,” said David L. Anderson, a former U.S. attorney. “We expect good corporate citizenship.” Pool photo by Karl Mondon

A year ago, David L. Anderson, then the U.S. attorney for the Northern District of California, revealed a case against the chief security officer of Uber, charging him with concealing a breach and secretly paying off the hackers.

“Silicon Valley is not the Wild West,” Mr. Anderson said at the time. “We expect good corporate citizenship. We expect prompt reporting of criminal conduct. We expect cooperation with our investigations. We will not tolerate corporate cover-ups. We will not tolerate illegal hush money payments.”

The Northern District of California stretches from Monterey to the Oregon border. Prosecutors have cases that have nothing to do with tech, including child pornography, firearms trafficking and the theft of an endangered lemur from the San Francisco Zoo. When Mr. Anderson stepped down last winter, he gave a 27-minute radio interview. He did not mention the words “Silicon Valley” or “tech.” Neither did anyone who called in.

Now in private practice, Mr. Anderson declined to be interviewed.

Other former U.S. attorneys who had charge of Silicon Valley also declined to be interviewed, including Robert Mueller, who served two years that had a brief jump in prosecutions before he became director of the F.B.I. in 2001. The prosecutor who oversaw Mr. Mueller’s cases in Silicon Valley, Leslie Caldwell, was selected by the Department of Justice to lead its Enron task force in the same year. It was a rare shining moment for Northern California prosecutors.

David Alan Sklansky, faculty co-director of the Stanford Criminal Justice Center, sees little likelihood of a return to those glory days, whatever Ms. Holmes’s fate.

“To prove someone guilty of a crime, in tech or out, it’s not enough to prove claims were made that were false,” he said. “You have to prove intent to deceive. That typically requires a large investment of resources — time, experienced prosecutors and investigators. That is an investment the Department of Justice hasn’t been making for two decades.”

But there are likely to be cases if prosecutors look, he said.

“I don’t know any reason to believe Silicon Valley is unusually honest,” Mr. Sklansky said.